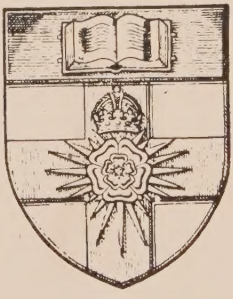
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

REFERENCE ONLY

346-4 MxNorth



UNIVERSITY OF LONDON
LIBRARY

Digitized by the Internet Archive
in 2026

https://archive.org/details/irish-reports_1917_1

THE IRISH REPORTS.

1917—Vol. I.

IRISH REPORTS 1894-

REPRINT 1976

Printed and Published
in Great Britain by
Professional Books Limited,
of Milton Trading Estate,
Milton, Abingdon, Oxon.

PROFESSIONAL BOOKS LIMITED

THE IRISH REPORTS

PUBLISHED UNDER

THE CONTROL OF THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND.

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE COURT OF APPEAL,

THE HIGH COURT OF JUSTICE,

THE COURT FOR CROWN CASES RESERVED,

IN IRELAND,

AND

THE IRISH LAND COMMISSION.

EDITED BY

T. HENRY MAXWELL,

BARRISTER-AT-LAW.

1917.

VOL. I.

CHANCERY DIVISION AND LAND COMMISSION.

DUBLIN:

PUBLISHED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND

BY E. PONSONBY, LTD.,

116, GRAFTON STREET.

1917.

BIBL. LONDIN. UNIV.

DUBLIN:

PRINTED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND

At the University Press,

BY PONSONBY AND GIBBS.

Lord Chancellor.

THE RIGHT HON. SIR IGNATIUS JOHN O'BRIEN, BART.

Lords Justices of Appeal.

THE RIGHT HON. STEPHEN RONAN.

THE RIGHT HON. THOMAS FRANCIS MOLONY.

Chancery Division.

THE RIGHT HON. CHARLES A. O'CONNOR M.R.

THE HON. DUNBAR PLUNKET BARTON.

Land Judge.

THE RIGHT HON. JUDGE ROSS.

Irish Land Commission: Judicial Commissioners.

THE RIGHT HON. J. O. WYLIE.

THE HON. GERALD FITZGERALD.

Attorneys-General.

THE RIGHT HON. JAMES H. M. CAMPBELL K.C.

THE RIGHT HON. JAMES O'CONNOR K.C.

Solicitors-General.

JAMES O'CONNOR K.C.

JAMES CHAMBERS K.C.

ARTHUR WARREN SAMUELS K.C.

[These Reports will be cited as follows :—[1917] 2 I. R.]

REPORTERS.

Court of Appeal,	R. St. J. Chadwick, C. Lehane,	Barristers-at-law.
Master of the Rolls,	William Lawson, A. H. Webb,	Barristers-at-Law.
Mr. Justice Barton,	R. W. Lucas, D. M. Steen,	Barristers-at-Law.
Land Judge,	T. C. Tobias,	Barrister-at-Law.
Land Commission,	John Edwd. Walsh,	Barrister-at-Law.

CORRIGENDA.

Page 171, line 9, omit "no".

,, 295, line 6 from end, *for* "latter" *read* "former", and in line 4 from end, *for* "on" *read* "in".

MEMORANDA.

On 11th January, 1917, JAMES O'CONNOR K.C. was appointed His Majesty's Attorney-General for Ireland.

On 30th March, 1917, JAMES CHAMBERS K.C. was appointed His Majesty's Solicitor-General for Ireland. He died on the 11th day of June, 1917.

On 17th September, 1917, ARTHUR WARREN SAMUELS K.C. was appointed His Majesty's Solicitor-General for Ireland.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Allen *v.* Murphy, 484
Attorney-General *v.* Dublin Corporation, 401, 423
Attorney-General, Jackson *v.*, 332
Attorney-General, Kelly *v.*, 183

B.

Baker *v.* Blount, 316
Ballymacelligott Co-operative Agricultural and Dairy Society, Ltd., M'Ellistrim *v.* 93
Barklie, *In re*; M'Calmont *v.* Barklie, 1
Barklie, M'Calmont *v.*, *In re* Barklie, 1
Barry's Estate, *In re*, 11, 16
Blount *v.* Crozier, 461
Blount, Baker *v.*, 316
Buckley, *In re*, 47

C.

Christie deceased, Christie *v.* Christie, 17
Colles' Estate, *In re*, 260, 505
Colquhoun *v.* Longvale Brick and Lime Works, Ltd., 321
Commissioners of Charitable Donations and Bequests *v.* M'Cartan and Others 388
Cox *v.* Dublin City Distillery Ltd., No. 3, 203, 208
Crothers' Trusts, *In re* (No.2), 356
Crozier, Blount *v.* 461
Cusin, *In re*; Walker *v.* Cusin 63
Cusin, Walker *v.*, *In re* Cusin, 63

D.

D., *In re*, 344
D'Alton *v.* Gibbons; *In re* Gibbons, 448
Daly, O'Meagher *v.* 341, 493
Davy *v.* Redington, 250
Dublin City Distillery, Ltd., No. 3, Cox *v.*, 203
Dublin Corporation, Attorney-General *v.* 401, 423

E.

Edgeworth's Estate, 270

F.

PAGE
Fitzpatrick *v.* Warren, 156

G.

Geoghegan, *In re*, 361
Gibbons, D'Alton *v.*, *In re* Gibbons, 448
Gibbons, *In re*; D'Alton *v.* Gibbons 448
Gollogaly's Contract, Provident Association of London, Ltd., and, 240
Grealey *v.* Sampson 286, 289
Greene, Hewson *v.*, 123
Guiry, Hahesy *v.* 371

H.

Hahesy *v.* Guiry 371
Hamilton, Saunders *v.* 145, 149
Hayes *v.* Hayes, 194
Hewson *v.* Greene, 123
Hibernian Bank *v.* Yourell, 505
Holmes, *In re*; Villiers *v.* Holmes, 165
Holmes, Villiers *v.*; *In re* Holmes 165

J.

Jackson *v.* Attorney-General, 332

K.

Kelly *v.* Attorney-General, 183
Kelly *v.* O'Connor, 312
Kelly *v.* Kelly, 51
Kingsmill Moore's Rents, 244

L.

PAGE
Lloyd, Pennefather *v.* 337
Longvale Brick and Lime Works, Ltd., *In re*; Colquhoun *v.* Longvale Brick and Lime Works, Ltd., 321

M.

Mackey, Munster and Leinster Bank *v.* 49
M'Calmont *v.* Barklie, Barklie, *In re*, 1
M'Cartan, Wallace, *v.* 377
M'Cartan and Others, Commissioners of Charitable Donations and Bequests *v.* 388
M'Dowell *v.* M'Neilly, 117
M'Ellistrim *v.* Ballymacelligott Co-operative Agricultural and Dairy Society, Ltd., 93
M'Evoy, *In re*, 168
M'Kay, Walker *v.* M'Morren, deceased, 278, 280
M'Meekin *v.* Stevenson, 348
M'Morren, deceased, Walker *v.* M'Kay, 278
M'Neilly, M'Dowell *v.* 117
Masterson *v.* O'Halloran, 454, 457
Moore, Rents, *In re*, 244
Morgan *v.* Morgan, 181
Munster and Leinster Bank *v.* Mackey, 49
Murphy, Allen *v.* 484

N.

Newbridge Sanitary Steam Laundry, Ltd., *In re*, 67, 75
Norward and Blake's Contract, *In re*, 472

O.

PAGE

O'Connor *v.* Tanner, 56
O'Connor, Kelly *v.* 312
O'Halloran, Masterson *v.* 454, 457
O'Meagher *v.* Daly, 341, 493

P.

Pennefather *v.* Lloyd, 337
Ponsonby's Estate, *In re*, 466
Provident Association of London, Ltd., & Gollogaly's Contract, 240

R.

Redington, Davy *v.* 250

S.

Sampson, Grealey *v.* 286, 289
Sartoris *v.* Shackleton, 129
Saunders *v.* Hamilton, 145, 149
Shackleton, Sartoris *v.* 129
Shanahan *v.* Shanahan, 57
Smith, *Re*, 170
Stevenson, M'Meekin *v.* 348
Sullivan, deceased, Sullivan *v.* Sullivan, 38

T.

Tanner, O'Connor *v.* 56

V.

Villiers *v.* Holmes; *In re* Holmes, 165

W

Walker *v.* Cusin; *In re* Cusin, 63
Walker *v.* M'Kay, M'Morren, deceased, 278, 280
Wallace *v.* M'Cartan, 377
Warren, Fitzpatrick *v.* 156

Y.

Yourell, Hibernian Bank *v.* 505

TABLE OF CASES CITED.

A.

PAGE

Acherley *v.* Vernon, . 297, 298
Acklacca Co-operative Creameries, Ltd. *v.* Lynch, . . 96
Adams *v.* Adams, . . 357, 358
Adams *v.* Robarts, . 357, 358, 359
Alfred Melson & Co., Ltd., . 77, 90
Allen *v.* Callow, . . . 293
Amalgamated Syndicate, *In re*, 77, 89, 90
Andrews *v.* Mitchell, . . 96, 109
Anglo-Egyptian Navigation Company, *In re*, . . 73
Anglo-Greek Steam Company, *In re*, . . . 73, 76, 87
Armstrong *v.* Lyn, . . . 245
Arnott *v.* Arnott, . . 390, 393
Ashton, *In re*, ... 245
Attorney-General *v.* Becher, 334, 335
Attorney-General *v.* Bishop of Oxford, ... 187
Attorney-General *v.* Clerkenwell Vestry, . . . 384
Attorney-General *v.* Dorking Union, ... 384
Attorney-General *v.* Downing, 297
Attorney-General *v.* Fletcher, 40
Attorney-General *v.* Gladstone, 390
Attorney-General *v.* Hall, . 450
Attorney-General *v.* Herrick, 451
Attorney-General *v.* Ironmongers' Co., . . 186, 188
Attorney-General for Ireland *v.* Proby, 270, 271, 272, 275, 276
Australian Joint Stock Bank, . 72
Auld *v.* Glasgow Working Men's Building Society, . . . 106

B.

Baker and Selmon's Contract, 475
Bamfield *v.* Popham, . . 263
Banister, *Re*, ... 323
Bank of England *v.* Vagliano, 27
Barden *v.* Meagher, . . 5
Barnes *v.* Crowe, . 297, 298, 310
Bartlett, *In re*, . . . 324
Bathurst *v.* Errington, . 358, 360
Batten, Proffitt, & Scott *v.* Dartmouth Harbour Commissioners, . . . 342, 494
Beaufort, Duke of, *v.* Neeld, . 324
Beckford *v.* Parnecott, . . 310
Belfast Poor Law Guardians *v.* Belfast Corporation, 406, 409, 410, 411, 412, 414, 420, 421, 427, 429, 432, 433, 441, 443
Bell *v.* Balls, ... 354
Benyon *v.* Benyon, . . . 290
Bird *v.* Lee, . . . 186, 188
Birkett, *In re*, . . 187, 190
Biscoe *v.* Great Eastern Railway Co., ... 383
Blake *v.* Bayne, . 166, 475, 481
Blashill *v.* Chambers, . . 105
Blann *v.* Bell, . . . 317
Blight *v.* Hartnoll, . . 5, 301
Board of Trade *v.* Black, . 458
Boddington *v.* Clairet, . . 8
Boulton *v.* Crowther, . . 383
Bowden, *In re*; Andrew *v.* Cooper, ... 210
Bowen *v.* Barlow, . . . 253
Bowen *v.* Lewis, . . . 295
Bowers *v.* Bowers, . . . 264
Bowes *v.* Bowes, . . 304, 310
Bradlaugh *v.* Clarke, . . . 127
Bradley *v.* Flood, 166, 474, 476, 477, 478, 479
Brennan *v.* Moran, . 290
Bright *v.* Rowe, . . . 198
Brown *v.* Burdett, . . 313
Brown *v.* Oakshott, . . 324
Brown *v.* Groombridge, . 281
Browne *v.* Yeale, . . . 391
Buckley, *In re*, . . 179
Butler *v.* Springmount Co-operative Dairy Society, 96, 100, 115

PAGE
Butterly *v.* Carroll, . . 149
Butterworth *v.* West Riding of Yorkshire River Board, 381, 386
Bwlch *v.* Plwm Co., Ltd., *Re*, 73, 76

C.

Carpenter, *In re*; Carpenter *v.* Disney, ... 40
Carrick *v.* Wigan Tramway Co., 494
Catt *v.* Wood, 100, 102, 109, 115
Chamberlain *v.* Brockett, 186, 188
Champion, *In re*, 299, 300, 301, 306, 309
Chapman *v.* Brown, 187, 188, 190, 191
Clemow, *In re*; Yeo *v.* Clemow, 313
Chic, Ltd., *In re*, . . 77, 90
Choat *v.* Yeats, . . . 281
Christy *v.* Gordon, . 150, 152
Clode *v.* Andrews, . . 335
Coates *v.* Stevens, . . 40, 44
Cockburn *v.* Newbridge Steam Laundry Co., Ltd., . . 68, 73
Cocks *v* Manners, . . . 391
Cole *v.* Scott, . . 308, 309
Coley, *In re*, . . 464, 465
Colney Hatch Case, . . 386
Commissioners of Sewers of London *v.* Gellatly, . . 210
Concha *v.* Concha, 207, 209, 211, 221, 222, 235
Condrin, *In re*; Colahan *v.* Condrin, ... 119
Connolly, *Re*, . . 186, 188
Connolly *v.* Stewart, 131, 132, 133. 141
Consolidated South Rand Mines Deep, Ltd., *In re*, . . 72, 77
Coolmoyne Co-operative Creamery *v.* Bulfin, . 103, 104, 113
Cooper *v.* Cooper, 42, 166, 167, 306, 474, 479, 480, 481, 482
Cooper, *In re*, . . . 210
Cope *v.* Breslin, . . . 494
Corbet *v.* Corbet, . 279, 282, 283
Corcoran *v.* Wade, . 126, 128
Coward *v.* Lackman, 317, 319, 320
Cowell *v.* Buchanan, 132, 134, 136, 138, 139, 140, 141, 142, 143, 144
Cox *v.* Dublin City Distillery (No. 2) . . . 205, 209, 210, 223, 226, 228, 229, 231, 232, 236
Cox *v.* Hutchinson, 96, 97, 100, 102, 109, 110, 112, 113, 115
Crane *v.* Naughten, . 350, 351
Crawford *v.* Lord Annaly, . 168
Crigglestone Coal Co., Ltd., *Re*, 72, 75, 77, 90
Crisp *v.* Bunbury, . . 96
Crothers, *In re*, . . . 357
Cussen *v.* Hynes, . . . 391

D.

Da Costa *v.* Keir, . . 264, 268
Dacre *v.* Patrickson, . . 281
Darby *v.* Darby, . . . 24
Dawson *v.* Higgins, 291, 292, 295
Dawson *v.* Small, . . 188, 191
Davies *v.* Games, . . 24, 28, 33
Davis *v.* Davis, 24, 26, 28, 32, 33
Davis' Estate, *In re*, . . 263
Dean, *In re*, . . . 449, 453
De Beauvoir *v.* De Beauvoir, . 65
Delves *v.* Delves, . 323, 327, 331
De Mora *v.* Concha, 207, 211, 220, 221
De Vesci *v.* O'Connell, . . 437
Dewhurst and others *v.* Clarkson, . 96
De Witte *v.* Palin, . . 182
Diamond Fuel Company, *In re*, 77
Dickinson *v.* Stidolph, . 298, 303
Diver *v.* M'Crea, . . . 120
Dobell *v.* Hutchinson, . . 351
Doe d. Angell *v.* Angell, . 128
Doe d. Biddulph *v.* Hole, 306, 310
Doe d. Winter *v.* Perratt, . 257
Doe d. York *v.* Walker, . 301, 310
Doherty *v.* Kennedy, 207, 210, 211, 212, 213, 215, 223, 227, 238
Domville *v.* Callwell, . . 485
Donald, *Re*, . . . 302, 306
Donoughmore *v.* Forrest, . 367
Doody *v.* Higgins, . . 64, 65
Douglas (*In re*) Obert *v.* Barrow, 390, 396, 398
Douglas *v.* Andrews, . . 198
Down *v.* Worrall, . . . 390
Drew, *In re*, ... 465
Driver *v.* Broad, . . . 253
Driver *v.* Frank, . . . 463
Drury *v.* Smith, . . 313, 315
Dublin City Distillery, Ltd., *v.* Doherty, 208, 213, 214, 224, 225, 226, 228, 231, 232, 234, 238, 239
Dublin County Council *v.* Kilmainham U. D. C. . . 411
Dublin County Council *v.* Pembroke Urban District Council, 411
Duffie *v.* Duffie, . . . 264
Dumner *v.* Pitcher, . 39, 44, 119
Dundee, Magistrates of, *v.* Morris, . . . 187, 188

PAGE
Dunne *v.* Byrne, . . . 391
Dunne *v.* Duignan, . 334, 335
Duppa *v.* Mayo, . . . 298
Dyer *v.* Dyer, . . . 119

E.

Earls' Trusts, *In re*, . . 310
East Fremantle Corporation *v.* Annois, ... 383
Electric Telegraph of Ireland, *In re*, ... 77
Elementary Education Acts, 1870 and 1873, . . . 313
Ellard *v.* Phelan, . . . 391
Elliott, *In re*, ... 457
Elliott *v.* Brown, . . . 25
Essell *v.* Hayward, . . 77

F.

Falconar *v.* Corporation of South Shields, . . . 381
Farren, *Re*, ... 296
Farrell *v.* Donnelly, 364, 365, 368
Farrer *v.* Nash, . . . 475
Fentiman *v.* Fentiman, . . 182
Ferrand *v.* Hallas Land Building Co., . . . 381, 386
Finlason *v.* Tatlock, . . 65
Firmin, *Re*, ... 77
Fisk *v.* Attorney-General, . 186, 187, 188, 191
Fletcher *v.* Fletcher, . . 263
Flood's Estate, . . . 368
Fogarty *v.* Shanahan, . . 366
Ford *v.* The Earl of Chesterfield, 494
Fordom *v.* Parsons, . . 381, 385
Forster's Estate, . . . 4, 6
Forth *v.* Chapman, . . 264
Foster *v.* Bernard, . . 242
Foster's Estate, . . . 253
Francis *v.* Harrison, . . 210
Franks *v.* Bollans, . 252, 257
Fraser, *Re*, . 300, 302, 304, 306

G.

Gaffney *v.* Fetherstonhaugh, 131, 132, 133, 134, 135, 136, 139, 141, 142, 143
Gaitskell, *In re*, . . . 346
Garrick *v.* Lord Camden, . 65
Geddis *v.* Bann Reservoir, . 383
Gee *v.* Mayor of Manchester, 264
Gibbings *v.* Hungerford, 381, 386
Girdlestone *v.* Doe, . . 65
Gittings *v.* M'Dermott, . 65, 66
Glossop *v.* Heston Local Board, 384
Gloster *v.* Ryan, . 131, 132, 133, 141, 142
Goodtitle *v.* Meredith, 297, 298, 299, 302, 304, 310
Gosford, Earl of, *v.* Blair, . 150
Gover's Case, . . . 436
Grainger, *In re*, . . 280, 281
Graham *v.* Wroughton, 381, 386, 387
Greaves *v.* Tofield, . . 113
Greene (*In re*) Fennelly *v.* Cheator, ... 391
Greville *v.* Browne, . . 319
Greymouth, *Re*, Point Elizabeth Railway and Coal Co., Ltd., 210, 219, 220
Griffiths *v.* Jones, . 323, 328
Griffith's Policy, *In re*, . 465
Grimond *v.* Grimond, . . 392
Grosvenor *v.* Durston, . . 40, 44
Guyton and Rosenberg's Contract, ... 253
Gwynne *v.* Muddock, . . 65

H.

Halkett *v.* Earl of Dudley, . 475
Hamill *v.* Murphy, . . 474
Hammersley, *In re*, . . 263
Hamond *v.* Walker, 206, 207, 209, 210, 220, 230, 239
Handcock *v.* Handcock, 342, 495, 497, 504
Hare and O'More's Contract, *In re*, ... 324
Harris, *In re*; Leacroft *v.* Harris, 40, 43, 45, 46
Heard *v.* Pickthorne, 101, 102, 109, 110, 112, 114, 115
Hearle *v.* Hicks, . . . 339
Heming *v.* Clutterbuck, . . 293
Hewett *v.* Snare, . 279, 280, 283
Hill *v.* East and West India Dock Co., . . 436, 437
Hilliard *v.* Moriarty, 342, 343, 495, 496, 497, 499, 504
Hinde *v.* Whitehouse, . 349, 353
Hocking, *In re*, . . . 463
Hodges *v.* Peacocke, . . 290
Holford *v.* Wood, . . 281
Holland *v.* Chambers, . 166, 480
Howard, *Re*, . . . 5, 6
Howarth, *In re*, . . . 182
Howlett *v.* Tarte, . . 209, 211
Howse *v.* Chapman, 279, 281, 283, 285

PAGE

Hulme *v.* Heygate, . . 298
Humphries *v.* Humphries, 209, 211
Hungerford, *In re* . . 12, 13
Hunter *v.* Attorney-General, . 334, 392, 398
Hunter *v.* Bullock, . 188, 191
Hunter, *In re*; Hood *v.* Att.-Gen., . . . 398, 399
Hurst *v.* Beach, . . . 290
Hussey *v.* Domville, 485 489, 490, 491
Hutchins, *In re*, . . . 494

I.

Inland Revenue Commissioners *v.* Muller & Co.'s Margarine, Ltd., ... 90
Irish Land Commission *v.* Ryan, 210, 211, 222, 223, 236

J.

Jackson *v.* Barry Railway Co., 103
Jackson *v.* Jackson, 23, 28, 29, 33
Jarman's Estate, *In re*; Leavers *v.* Clayton, ... 392
Jay *v.* Johnstone, . . 113
Jeffereys *v.* Small, . . . 25
Jeffrey *v.* Tredwell, . . 258
Johnson *v.* Webster, . . 253
Jones *v.* Westcomb, . . 6

K.

Keay *v.* Boulton, . . 64, 65, 66
Kelly *v.* Kelly, . . . 60, 62
Kenebel *v.* Scrafton, . . 494
Kennedy *v.* Panama, &c., Mail Co., 324
Kenworthy *v.* Schofield, . . 350
Kilford *v.* Blayney, 280, 281, 283
Kilkelly *v.* Caldwell, . 133, 136
Kilkelly *v.* Powell, 252, 255, 256, 258
Killeen *v.* Lambert, . 150, 152
Kinson Pottery Co. *v.* Poole Corporation, ... 381
Kitts *v.* Moore, . . . 96

L.

Laffan and Downes' Contract, 463, 464
Lake *v.* Gibson, . . . 25
Langham Skating Rink Co., . 89
Lanphier *v.* Buck, . . 65

PAGE

Lart, *In re*; Wilkinson *v.* Blades, ... 209
Latham *v.* Travers, . . 253
Laverty *v.* Laverty, . . 452
Leader *v.* Moxon, . . 382
Lee *v.* Rayson, . . . 324
Leonard *v.* Kellett, . 342, 343
Leslie *v.* Thompson, . . 324
Lett *v.* Randall, . . . 5
Lewis *v.* Stephenson, 485, 486, 487, 490, 492
Litton *v.* Murphy. . . . 59, 61
Livesey *v.* Livesey, . . . 358
Lomax *v.* Lomax, . . 279, 283
London & County Coal Co., . 77
London & North Western Railway *v.* Bradley, . . . 383
Long *v.* Millar, . 349, 351, 352
Long *v.* Moore, 295, 296, 303, 304, 307, 309
Long *v.* Ovenden, . . . 182
Longworth *v.* Bellamy, . . 463
Lory, *In re*, . . . 463
Lyne's Trusts, *In re*, . . 465

M.

Mackesy *v.* Mackesy, 252, 255, 256, 258
M'Caffrey *v.* M'Mahon, . . 96
M'Cann *v.* Downshire, 149, 153, 154
M'Carthy *v.* Swanton, . 134, 139
M'Cusker *v.* Commissioners of Valuation, ... 444
M'Dermott *v.* Anderson, . 334
M'Dermott *v.* Caldwell, 485, 489, 490, 491, 492
M'Gowain *v.* City of Glasgow Friendly Society, . . 96
MacLaughlin *v.* Campbell, 333, 335, 336, 452
M'Loughlin & M'Grath's Contract, ... 474
M'Mahon, *In re*, 456, 457, 459, 460
M'Spadden *v.* Patterson, 495, 496, 504
Madden *v.* Ikin, . . 358, 360
Mannox *v.* Greener, . . 319
Manser *v.* Back, . . . 324
Mansergh *v.* Campbell, . . 5
Marine Mansions Co., *In re*, . 495
Martin *v.* Margham, . 186, 188
Mason *v.* Mason, . . . 5, 6, 9
Mathews *v.* Mathews, . . 253
Mauser *v.* Back, . . . 324
Mellick's Case, . . . 453
Menier *v.* Hooper's Telegraph Works, ... 72, 77
Meredith *v.* Treffory, . . 358

PAGE
Mersey Docks Trustees *v.* Gibbs, ... 383
Mews *v.* Carr, . . . 354
Milnes *v.* Slater, . . 280, 281
Milroy *v.* Milroy, . . . 65
Molloy *v.* Gray, . . 381, 385
Morice *v.* Bishop of Durham, 391, 392, 397, 398, 399, 452
Morris *v.* Barrett, 23, 24, 26, 27, 34, 35
Morrison *v.* Glover, . . 113
Morrison, *In re*, . . . 463
Mounsey *v.* Blamire, . . 66
Mountcashell, Earl of, *v.* Smyth, 289, 290, 291, 295, 296, 299, 303, 304, 305, 306, 307, 309
Mulkern, Lord, . . . 96
Municipal Building Society *v.* Richards, . . . 108
Municipal Permanent Investment Building Society *v.* Kent, ... 96, 110
Mylne *v.* Dickinson, . . 96

N.

Nash *v.* Allen, . . . 465
National Live Stock Insurance Company, *In re* The, . . 73
National Provincial Bank of England *v.* Games, . . 458
Nelson *v.* Brady, 495, 497, 501, 504
Nelson *v.* Headfort, 131, 132, 133, 134, 135, 136, 139, 140, 141, 142, 143
New London and Suburban Omnibus Co., *In re*; Appleyard *v.* same Co., . . 210
Newbegin *v.* Bell, 279, 281, 282, 283, 284, 285
North-Western Salt Co., Ltd., *v.* Electrolytic Alkali Co., Ltd., ... 96, 116
Northern Banking Co. *v.* Sloan, 342, 343, 344, 499

O.

O'Connell *v.* Commissioners of Valuation, ... 391
O'Hanlon *v.* Logue, . 390, 450
O'Kane *v.* Burns, . . . 366
Oliver's Settlement, *In re*, . 263
Oliver *v.* Rooney, . . . 161
O'Mahony *v.* Burdett, . . 268
O'Meara *v.* Att.-Gen., . . 392
O'Neill *v.* Walsh, . . . 381
Osborne *v.* the Duke of Leeds, 288, 290, 294

P.

Pain *v.* Benson, . . . 198
Palliser *v.* Dale, . . . 96
Pares, *In re*, ... 346
Park, *Re*, ... 308
Partington *v.* Attorney-General, 412
Passmore *v.* Oswaldtwistle Urban District Council, . 382, 384
Peel's Settlement, . . 249
Pentland's Estate, . . . 12, 15
Perkins *v.* Micklethwaite, . 305
Perry *v.* Farley, . . 150, 151
Peyton *v.* M'Dermott, 494, 495, 497, 501, 503, 504
Philps' Will, *In re*, . . 65
Phillips *v.* Eastwood, . . 283
Pierce *v.* Corf, . . 350, 353
Piercy, *In re*; Whitwham *v.* Piercy, ... 392
Pigott *v.* Waller, . 297, 298, 310
Pippin *v.* Bickford, . 463, 465
Powerscourt *v.* Powerscourt, . 451
Prince, *In re*; Godwin *v.* Prince, 313
Pym *v.* Lockyer, . . . 246

R.

Radford *v.* Willis, . 463, 464, 465
Rayer, *In re*, . . . 300, 311
Reeves *v.* White, . . . 96
Reg. *v.* Titterton, . . . 127
— *v.* Corporation of Dublin, . 444
— (Wexford County Council) *v.* The Local Government Board, . . . 444
R. *v.* Churchwardens of Wigan, 383
— (Belfast Corporation) *v.* Belfast Poor Law Guardians, 443
— (M'Aneny) *v.* County Court Judge of Tyrone, . . 96
Rice, *Ex parte*, . . . 263
Ridgway *v.* Wharton, . . 351
Rishton *v.* Cobb, . 5, 6, 8, 9, 10
Rishton *v.* Whatmore, . 350, 353
Roberts *v.* Charing Cross, Euston, and Hampstead Railway Co., . . 383
Robinson *v.* Workington Corporation, . . . 382, 384

PAGE

Roche *v.* M'Dermott, . . 453
Rodgers *v.* Houston, . . 263
Rogerson, *In re*, . . . 188
Rosenburg *v.* Northumberland Building Society, . 96, 115
Russell *v.* Dickson, . . 290

S.

Sackville West *v.* Holmesdale, 265
Sailing Ship Kentmere Co., . 72, 89
Salter; *In re*, Rea *v.* Crozier, . 392
Salusbury *v.* Denton, . . 334
Sanderson *v.* Walker, . . 323
Sanitary Commissioners of Gibraltar *v.* Orfila, . . 384
Scott *v.* Best, . . . 252
Scott *v.* Brownrigg, . 334, 335
Shardlow *v.* Cotterell, . 350, 352
Sharp *v.* Lush, . . . 313
Shelley's Case, . . . 254
Sheridan *v.* O'Reilly, . . 358
Shuttleworth *v.* Greaves, . 40
Sims *v.* Quinlan, . . . 391
Smith, *In re*; Smith *v.* Smith, 281
Smith, *In re*, . . . 309
Smith *v.* Butcher, . . 65
Smith *v.* Casen, . . 313, 315
Smith *v.* Galloway, . 96, 109
Smith *v.* Palmer, . . 64
Smith *v.* Savage, . 26, 31, 36
Southwark and Vauxhall Water Co. *v.* Wandsworth Board of Works, ... 383
Stamford, Earl of, *v.* Sir John Hobart, ... 266
Standing *v.* Bowring, . . 120
Stannard, *In re*; Stannard *v.* Burt, ... 64, 65
Stillwell *v.* Melleresh, . . 307
Stone *v.* Godfrey, . . 324
Stone *v.* Liverpool Marine Society, 96, 100, 102, 110, 111, 112, 113, 115
Stoodley, *In re*; Hooson *v.* Locock, ... 339
Suburban Hotel Co., *In re*, 76, 78, 87, 89
Sudeley *v.* Attorney-General, 166, 167, 481, 482
Suisse *v.* Lowther, . . 290
Sutton *v.* Clarke, . . . 383
Sutton, *In re*; Stone *v.* Att.-Gen., ... 391
Sykes *v.* Sykes, . . . 302
Symington *v.* Symington Quarries, Ltd., . . 76

T.

PAGE

Tabernacle Permanent Building Society *v.* Knight, . . 107
Talbot *v.* Cody, . . 119, 127
Tancred's Settlement, *In re*, . 247
Tanner, *In re*, . . . 182
Tate *v.* Gilbert, . . . 314
Tate *v.* Hilbert, . . 314, 315
Tate *v.* Leithead, . . 313, 315
Taylor, *Re*, . . 301, 306
Taylor *v.* Gorman, . 498, 501
Tench *v.* Flanagan, . . 148
Tevlin *v.* Gilsenan, 166, 167, 474, 480
Thomas *v.* Lambert, . . 469
Thomas Brinsmead & Sons, *In re*, 72, 73, 76, 77, 88, 89
Thomson's Estate, *In re*, 435, 437
Thornhill *v.* Nixon, . . 463
Tipperary Creamery Society *v.* Hanley, ... 97
Townsend *v.* Carus, . . 451
Trott *v.* Buchanan, . . 281
Trott *v.* Hughes, . . . 96
Troy *v.* Kirk, ... 367
Truell *v.* Tysson, . . . 463

U.

Underhill *v.* Roden, . . 6

V.

Vallance *v.* Vallance, . . 253
Vanneck *v.* Benham, . 166, 167, 474, 482
Vaughan, *In re*, . . . 188
Venn & Furze's Contract, . 475
Verrell, *Re*, ... 475
Villiers *v.* Holmes, . 474, 483

W.

Walton, *Ex parte*, . 436, 437
Ward *v.* Turner, . . . 314
Ward *v.* Ward, . 26, 30, 31, 36
Warren *v.* Wright, . . 5
Waterer *v.* Waterer, . . 24
Wayman *v.* Perseverance Lodge, ... 109
Webster *v.* Cecil, . . 323, 324
Weld, *In re*, ... 346
West, *Ex parte*, . . . 198
West *v.* Sackville, . . . 54

	PAGE
White, *In re*,	464
White *v.* The Bishop of Peterborough,	494
Whitefield, *Re*,	42
Whitling, *Re*,	302, 306
Whistler, *In re*,	475
Wilkins *v.* Reeves,	210
Wilkinson and others *v.* Jagger and others,	96
Williams, *In re*,	188, 190, 191, 449
Williams *v.* Kershaw,	391
Wilson *v.* Lord Bury,	450
Wilson *v.* O'Leary,	290
Wincanton Rural District Council *v.* Parsons,	381
Winter *v.* Wilkinson,	112
Woods *v.* Brown,	324, 328
Woolley, *In re*,	65
Worman *v.* Worman,	211
Wright *v.* Kirby,	342, 494

Y.

Yarnold *v.* Wallis,	310

CASES

DETERMINED BY

THE CHANCERY DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL.

1917.

IN RE BARKLIE.

M'CALMONT *v.* BARKLIE.

M. R.
1916.
June 23, 29.

Will—Construction—Gift of Annuity to Daughter until Marriage—Proviso for cesser of the Annuity on Marriage, and gift of capital Sum in substitution—Death of Daughter unmarried—Absolute Gift—Gift for Life.

A testator bequeathed to his daughter until she should marry an annuity of £125, and provided that on her marriage the annuity should determine, and in lieu thereof he bequeathed to her the sum of £2500 with interest at 5 per cent. The annuity and legacy were charged upon the testator's real estate, which was devised to his son; and the will provided that the legacy should not be called in, unless the interest thereon fell into arrear, without notice to the testator's son, but that he or his heirs, &c., were to be at liberty to redeem the annuity at any time on giving notice of their intention so to do.

Held, that the will manifested the intention of the testator to make a personal provision for his daughter during her life so long as she remained unmarried, and in the event of her marriage to give her a fortune, and that the annuity determined upon her death unmarried.

Rishton v. *Cobb* (5 M. & C. 145) distinguished; *Boddington* v. *Clairat* (25 Ch. D. 685), *Mason* v. *Mason* ([1910] 1 Ch. 695) followed.

M. R. 1916.

M'CALMONT v. BARKLIE.

SUMMONS.

The following statement of facts is taken from the judgment of the Master of the Rolls:—

"In this case, a question arises whether an annuity bequeathed by will is a perpetual annuity or only for the life of the annuitant.

"Thomas Barklie, by his will, dated the 18th March, 1868, bequeathed to his only daughter, Helen Montgomery Barklie, until she should marry or should enter into a contract for marriage which should take effect, an annuity or yearly rent-charge of £125 (being equivalent to interest at the rate of £5 per cent. per annum on the principal sum of £2500 thereinafter mentioned) to be charged and chargeable on and yearly issuing and payable out of all and singular the testator's lands, tenements, and hereditaments.

"The will gives the annuitant a power of distress and entry in the event of non-payment of the annuity; but this is unimportant for the present purpose, unless there is any significance in the fact that the power is expressed to be given to the daughter only, and not to her, her heirs, executors, and administrators.

"Then follows a proviso that, if and when the testator's daughter should marry, or should enter into a contract for her marriage which should take effect (and provided, if same should be in her mother's lifetime, that it should be with her mother's consent in writing), then and from and immediately after the marriage the annuity should absolutely cease and determine; and in lieu of the annuity he bequeathed to his daughter the sum of £2500, to be charged from the time of the determination of the annuity upon his lands, tenements, and hereditaments, with interest at £5 per cent.

"Then follows a direction for the settlement of the sum of £2500, and subject and charged as aforesaid, he devised all his real estate, lands, and hereditaments, and his personal estate to his son, Robert Martin Barklie.

"The will also contains a proviso that it should not be lawful for the testator's daughter or any person or persons claiming through, under, or in trust for her, or otherwise for the time being entitled to the said charge or legacy of £2500 and interest, to call

in or require payment of the said charge or legacy, unless the interest for the same should fall into arrears for a period of three calendar months, without giving to his son, his heirs, executors, or administrators at least three calendar months' notice in writing of his or their intention so to do.

"This is immediately followed by a proviso in these terms:—'Provided, however, that the said lastly mentioned proviso and condition shall not preclude or prevent him or them, but that it shall be lawful for my said son, his heirs, executors, or administrators to redeem the said annuity by the like amount of, and to pay off the said legacy or charge at any time he or they may find it convenient and may consider it for his or their advantage so to do, upon giving to my said daughter or other person or persons so entitled as aforesaid at least three calendar months' notice in writing (irrespective of and without regard to the gale day or gale days for payment of interest thereon) of his or their intention so to do, it being my will and intention that the convenience and advantage of my said son shall be the primary and chief consideration in relation to the continuance of the said annuity or the said charge or legacy of £2500 and interest in lieu of such annuity on the security of my said real estate or the paying off and discharging of the same therefrom.'

"The testator appointed his said son his sole residuary legatee and executor. He made two codicils to his will, but he did not alter or revoke the dispositions I have mentioned.

"The testator's son and daughter survived him, and he left considerable real estate.

"The son made his will on the 19th May, 1903, and appointed Alexander Ward and James Martin M'Calmont executors thereof; and, after making certain bequests, he devised and bequeathed all his real estate to the use of his wife, Janet Barklie, and his sister, Helen Montgomery Barklie, in equal shares as tenants in common.

"He died on the 30th August, 1903, and probate of his will was granted on the 11th March, 1904, to Alexander Ward and James Martin M'Calmont.

"Helen Montgomery Barklie died on the 7th March, 1916, having made her will, dated 17th March, 1914, whereof she appointed Robert Chaine Alexander M'Calmont and Charles

M. R. 1916.

M'CALMONT v. BARKLIE.

Edward Callwell executors, and whereby, after making certain bequests, she devised and bequeathed her real and personal estate to trustees upon certain trusts; and probate of her will was granted on the 29th May, 1916, to Robert Chaine Alexander M'Calmont, the right of Charles Edward Callwell to a like grant being reserved.

"Helen Montgomery Barklie never married, and was paid the annuity of £125 up to her death.

"During her life she was not merely entitled to the annuity, but also, under the will of her brother, to a moiety of the lands on which it was charged from his death."

An originating summons was taken out by Robert Chaine Alexander McCalmont, executor of the will of Helen Montgomery Barklie, for the determination of the question whether the annuity bequeathed to the said Helen Montgomery Barklie was perpetual in the event of her death without having been married.

Harrison K.C. and *Newett*, for the plaintiff:—

It is admitted that as a general rule a gift of an annuity to a person without words of limitation is a gift only for the life of that person, but the rule yields to any indication of contrary intention on the part of the testator. In the present case the testator's intention that the annuity should be perpetual is shown by the following circumstances:—(*a*) the real effect of the will is to dedicate the sum of £2500 to payment of the annuity; it is in substance the same as if he had first charged his estate with the sum of £2500 in favour of his daughter, and then given her the income of that sum: *Forster's Estate* (1); (*b*) the provisions as to the redemption of the annuity, which is to be redeemed not at so many years' purchase, or at its actuarial value, but at the entire capital sum irrespective of the annuitant's age, and this, although the testator expressly says that the convenience of his son is to be the chief consideration. The expression "redeem" could only apply while the testator's daughter was unmarried, and in the event of redemption there is no provision for the settlement of the capital sum, and the payment of the income to her for life, which is inconsistent with the view that the testator intended her interest to be for life only, if she did not marry. (*c*) The will gives the

(1) 23 L. R. Ir. 269.

testator's daughter power to appoint and dispose of the said sum of £2500 and interest by deed, will, or codicil unto or amongst her issue (if any) or to any other person or persons, or for any other purpose, in default or failure of such issue.

Rishton v. *Cobb* (1) shows that the words "until she shall marry" do not necessarily mean until marriage or death. *Re Howard* (2) shows that this case is still law, although it was distinguished in *In re Mason*, *Mason* v. *Mason* (3), where there was a gift over on marriage. [He also referred to Hawkins on Wills, 2nd ed., 165-6; *Lett* v. *Randall* (4); *Blight* v. *Hartnoll* (5); *Warren* v. *Wright* (6); *Barden* v. *Meagher* (7); *Mansergh* v. *Campbell* (8).]

Jellett K.C. and *Edge*, for the defendant Janet Barklie:—

There is here no indefinite gift of income, and no appropriation of a fund to provide the income: the gift in terms is only to last until marriage, and the reference to the annuity being equal in amount to the interest on £2500 at 5 per cent. only shows that the testator intended his daughter's income to be the same before and after marriage.

The effect of a gift of an annuity until marriage was considered in *In re Mason*, *Mason* v. *Mason* (3), where the testatrix directed her trustees to pay the income of her residuary estate to her daughter until she should marry, and after her marriage to pay to her thereout a legacy of £3000, and divide the balance between all the testatrix's sons surviving her. In that case Cozens-Hardy M.R. says (at p. 697):—"It will be observed here that there is not in form an absolute indefinite gift of income to Alice. In form it is limited up to a time. It is until she shall marry. It will also be observed that there is a gift over of the residue to the sons in the event of her marriage—a gift over of the residue, diminished only in that event by a capital gift of £3000 to the daughter . . . I cannot doubt what the intention of the testatrix was. The testatrix directs payment of the income of the trust premises to the daughter without any other limitation than these words 'until she shall marry'"; and Buckley L.J. says (at

(1) 5 M. & C. 145.
(2) [1901] 1 Ch. 412.
(3) [1910] 1 Ch. 695.
(4) 2 D. F. & J. 388.
(5) 19 Ch. D. 294.
(6) 12 Ir. Ch. R. 401.
(7) I. R. 1 Eq. 246.
(8) 3 D. & J. 232.

M. R. 1916.

M'CALMONT v. BARKLIE.

p. 700):—"Now, Alice does not take an absolute interest unless there is an indefinite gift of income. Reading this will I cannot find that there is. There is a gift of income to Alice until a time, and after that time there is another gift, a gift of the corpus. The testatrix has divided the time into two periods, one until Alice marries, and the other after she marries. She disposes of the income during the first period, and she disposes of the capital at the commencement of the second period. There is no indefinite gift of income." So also in the present case on the happening of a certain event the annuity is to cease, and other provisions take effect. The annuity, though only expressed to be terminable on marriage, is terminable on marriage or death: *Underhill* v. *Roden* (1); Jarman on Wills, 6th ed., ii, p. 1361. [The Master of the Rolls referred to the rule in *Jones* v. *Westcomb* (2) and Theobald on Wills, 7th ed., 657.]

The testator treated the legacy of £2500 as a substitute for the annuity; he says that it shall be lawful for his son, his heirs, executors, or administrators to redeem the said annuity and to pay off the said legacy or charge. This clause is for the benefit of the testator's son. The testator valued the annuity in order to enable his son to clear his estate in the event either of the daughter not marrying, or it not being known whether she would marry or not.

Newett, in reply:—

Rishton v. *Cobb* (3) is only cited for the purpose of showing that an annuity until marriage is not necessarily terminable on death. In *In re Howard* (4) Farwell J. says that *Rishton* v. *Cobb* (3) is not overruled. There is here no gift over on marriage as there was in *In re Mason* (5). As regards the power given to the testator's son to redeem the annuity, *Forster's Estate* (6) is the converse case to this. There the redemption price was ludicrously small if the annuity was perpetual; here it is ludicrously large if the annuity is not perpetual. If the testator was consulting his son's advantage (as he says he is), why should he fix the redemption price of the terminable annuity at an exorbitant figure instead

(1) 2 Ch. D. 494.
(2) 1 Eq. C. Ab. 245.
(3) 5 M. & C. 145.
(4) [1901] 1 Ch. 412.
(5) [1910] 1 Ch. 695.
(6) 23 L. R. I. 269.

of its actuarial value? The legacy of £2500 was to arise on the determination of the annuity; we say there was only one event on which the annuity would determine, the marriage of the testator's daughter; the other side say the annuity was terminable either on her marriage or her death; if so, the legacy of £2500 must be payable on her marriage or death.

Cur. adv. vult.

July 25.

O'CONNOR M.R., after stating the facts, proceeded:—

The question now arises whether the annuity ceased on the death of Helen Montgomery Barklie, or whether, in the events which have happened, it is a perpetual annuity.

Reading the will and construing it without the aid of authority, I would say that it manifested the intention of the testator to make a personal provision for his daughter during her life so long as she remained unmarried, and, in the event of her marriage, to give her a fortune which would be a provision for herself and her children, or with which she could purchase a settlement by her husband.

I can find nothing in the will inconsistent with this. Mr. Harrison, counsel for the plaintiff, who represents the estate of Helen Montgomery Barklie, relied on the proviso at the end of the will, which I have quoted verbatim, as showing that a perpetual annuity was given; but I cannot follow him in that. The phrasing of the proviso is not very happy; for instance, the testator's son is given power to redeem the annuity "by the like amount of," and to pay off the said legacy or charge. There is here some defect in phraseology. The only meaning I can give to the words "by the like amount of" is that they referred to an annuity of the like amount to be charged on some other security. The structure of the proviso does not admit of the reading that the like amount is the amount of the legacy of £2500.

But, if we fall back on authority, we have, as Mr. Harrison admitted, this clearly established proposition, that an annuity given by will to A. B. *simpliciter* is an annuity for A. B.'s life, and no longer. This being so I fail to see why the annuity should be extended beyond the life of A. B. by making it determinable on an event which, if it happens at all, must happen

M. R. 1916.

M'CALMONT v. BARKLIE.

during A. B.'s life. But Mr. Harrison says that this is exactly what has been established by authority. He cited *Rishton* v. *Cobb* (1). There a sum of £2000 was given to trustees upon trust to authorize and empower Lady Fanny Campbell to receive the dividends as they became due, so long as she should continue single and unmarried. There was a gift over on attempted alienation, but not in the event of her marriage. Lord Cottenham held that the right to the income did not cease at the death of the legatee, and that she was entitled to the corpus. That case is not exactly like the present. The gift over was not precisely the gift of an annuity, but of the annual income of a fund; and there was no gift over in the event of marriage. But Lord Cottenham's judgment certainly supports Mr. Harrison's argument. He says (at page 152):—"If, therefore, she had been single and unmarried, and had so remained, she would have been entitled to the dividends, without any limitation of time. Her interest would not have been determinable by her death, but (independently of the forfeiture upon alienation) only by her ceasing to be single and unmarried. This is different from a gift of dividends during widowhood. The state of widowhood must determine with the life of the widow; but the gift, so long as the legatee shall remain single and unmarried, must be considered as requiring the act of marriage to determine the interest. This gift, therefore, is of the dividends of stock, without limitation as to time, which carries the stock itself."

Let us now see how Lord Cottenham's dictum has been dealt with by eminent English judges, who came after him. In *Boddington* v. *Clairat* (2), a case the facts of which did not bring it within the decision in *Rishton* v. *Cobb* (1), Lord Selborne said (at p. 691):—"With regard to the case of *Rishton* v. *Cobb* (1), the respect I feel for the great judge who decided it prevents my saying more of the judgment than that I do not understand it, and that, if it were applicable to this case, I should hesitate for some time before I could follow it. I think, however, that it is not applicable. In saying so, I do not rely on what seems to me a somewhat refined distinction between the gift of the income

(1) 5 M. & C 145. (2) 25 Ch. D. 685.

of a fund and the gift of an annuity, but I refer to what Lord Cottenham himself says, regarding, as he did, the annuity in that case as perpetual, and not for life only :—'This is different from a gift of dividends during widowhood. The state of widowhood must determine with the life of the widow.' It is quite plain that it is not to be inferred from his judgment that he would have decided the present case otherwise than Lord Justice Fry has decided it. *Rishton* v. *Cobb* (1), therefore, does not bear on the present case, and if it did, it would take some time to convince me that it ought to be followed."

Lord Selborne certainly did not approve of *Rishton* v. *Cobb* (1).

Lord Cottenham's judgment was again the subject of comment in *Mason* v. *Mason* (2). There the testatrix directed the trustees of her will to pay the income of her residuary estate to her daughter until she should marry, and after her marriage to pay to her thereout a legacy of £3000, and divide the balance between the testatrix's sons surviving her.

It was held that the interest of the daughter in the residue was for her life, or until her marriage, and that the gift over to the sons took effect on the death of the daughter unmarried. On the facts the case was distinguishable from *Rishton* v. *Cobb* (1) in the circumstance that there was a gift over on marriage, while in *Rishton* v. *Cobb* (1) there was not. Whether the distinction was or was not a material one, it was gladly relied on as providing an escape from Lord Cottenham's judgment. Here is what Cozens-Hardy M.R. says, at pp. 698-9, after quoting the passage from Lord Cottenham's judgment which I have already read :—"Now, but for one passage in the judgment which I shall come to in a moment, that last sentence seems exactly to fit this case, because here the trust is to pay the income to the daughter until she shall marry, and Lord Cottenham seems to have thought that under a gift in that form the act of marriage was required to determine the interest which otherwise was indefinite, and therefore, perpetual. Lord Cottenham goes on to point out that in that case there was no gift over upon marriage or upon death. Here

(1) 5 M. & C. 145. (2) [1910] 1 Ch. 695.

M. R. 1916.

M'CALMONT v. BARKLIE.

there is a gift over on marriage, and that seems to make a distinction which is not merely a distinction in form, but is in my opinion quite sufficient to prevent that somewhat cryptic passage in Lord Cottenham's judgment from being binding upon us in the sense of being applicable in this case." And at p. 700 Buckley L.J. says:—"The principal difficulty arises from *Rishton* v. *Cobb* (1). It would seem that if a lady be a widow, her widowhood may determine in two events. It will determine if she marries; it will determine also—I have Lord Cottenham's authority for it—if she dies. I should have thought the same was true of spinsterhood. I should have thought that a spinster ceased to be a spinster when she married, and ceased to be a spinster when she died. But it seems that Lord Cottenham finds a difference. I confess I cannot follow it. He says:—'The state of widowhood must determine with the life of the widow; but the gift, so long as the legatee shall remain single and unmarried, must be considered as requiring the act of marriage to determine the interest.' However that may be, *Rishton* v. *Cobb* (1) is distinguishable from this present case, because there was there no gift over on marriage or death, but only a gift over on alienation. Here there is a gift over, and *Rishton* v. *Cobb* (1) does not necessarily govern this case."

So I say in the present case there is a gift over which saves it from the disputed dictum of Lord Cottenham, and I feel bound to hold that the annuity given by the will of Thomas Barklie to his daughter, Helen Montgomerie Barklie, until she should marry, coupled with the substituted gift of £2500 in the event of her marriage, was only an annuity for her life, or until she should marry.

Solicitors for the plaintiff: *Crawford & Lockhart.*

Solicitors for the defendants: *French & French.*

A. H. W.

(1) 5 M. & C. 145.

IN THE MATTER OF THE ESTATE OF LEOPOLD M. BARRY.

Wylie J.
1916.
March 28.
April 4.
Appeal.
Oct. 31.

Land Purchase Acts—Apportionment and Redemption—Rights of Owner of Head-Rent—Land Law (Ireland) Act, 1887 (50 & 51 *Vict. c.* 33), *sect.* 16, *sub-s.* 3—*Mode of fixing Price of superior Rent where Price of immediate Head-Rent previously fixed.*

Under sect. 16, sub-s. 3, of the Land Law (Ireland) Act, 1887 (50 & 51 Vict. c. 33), all that the owner of a part of an annuity, rentcharge, or rent apportioned upon land sold, is entitled to require is the redemption of such annuity, rentcharge, or rent, or of an apportioned part thereof. Under the discretionary parts of the sub-section, the Court may, in any proper case, whether apportionment has been made or not, redeem the whole of any annuity, rentcharge, or rent affecting land sold. In the ordinary course, a head-rent payable out of land sold and other land will be apportioned, and the part apportioned on the land sold redeemed, unless there are special circumstances which render it expedient to redeem the whole rent.

So *held* by Wylie J., and affirmed by the Court of Appeal.

In re Pentland's Estate (22 L. R. Ir. 649) explained.

The mode of fixing the redemption price of a superior head-rent, where the price of the immediate head-rent had been previously fixed, discussed.

APPLICATION to apportion a superior head-rent of £27 18*s.* 8*d.*, and to redeem the part apportioned on the lands sold.

The facts, as stated in the judgment of Wylie J., were as follows:—

The lands sold in this matter were subject to a rent of £42 4*s.* 4*d.*, and were also subject, in conjunction with other lands not sold, to a superior rent or rentcharge of £27 18*s.* 8*d.* The rent of £42 14*s.* 4*d.* was redeemed, by order of the 13th January, 1910, at the price of £1140, being about twenty-seven years' purchase, and that sum was, at the request of the apparent owner of the rent, placed to the separate credit of the redemption price on deposit receipt. No change was made in the investment until the 11th February, 1914, when, at the like request, it was taken off deposit receipt, and invested in £1446 5*s.* 6*d.* India 3 per cent. stock; and it had remained so invested until the

Wylie J. 1916.

In re Barry's Estate.

present application. At the time of the redemption of the rent of £42 4*s.* 4*d.* no application or order was made as to the superior rent of £27 18*s.* 8*d.*, because none of the parties knew of it at that time. It was only in proving title to the redemption price of the £42 4*s.* 4*d.* that the existence of the superior rent was discovered. The owner of this redemption price was a lunatic; and his committee, by direction of the Lord Chancellor, now applied for an order that the superior rent of £27 18*s.* 8*d.* be apportioned between the lands sold and the other lands liable thereto, and that the part apportioned on the lands sold be redeemed.

Hubert Hamilton, for the owner of the redemption price of the immediate head-rent of £42 4*s.* 4*d.*, in support of the application.

Jellett K.C., for the owner of the superior head-rent of £27 18*s.* 8*d.* The owner wishes his entire head-rent to be redeemed, as, if apportioned, the part remaining unredeemed will be much depreciated in value. He claims this as a matter of right, under sect. 16, sub-s. 3, of the Land Act of 1887: see *In re Pentland's Estate* (1), and particularly the judgment of FitzGibbon L.J., at pp. 653 and 654; also *In re Hungerford* (2). Further, he claims to be redeemed at the same rate of years' purchase as was fixed for the immediate head-rent in 1910. He was in no way responsible for the manner in which the redemption price of it has been invested in the meantime.

M. G. Longfield, for the vendor

April 4.

Wylie J.:—

[After stating the facts as above set out, his Lordship continued]:—I should have thought the granting of the order applied for a mere matter of course. Hundreds of such orders have been granted in similar cases without argument or objection every year since I sat here. But Mr. Jellett, on behalf of the owner of this superior rent or rentcharge, opposes apportionment, and claims as a matter of right to have the whole rentcharge redeemed. This claim is based on sect. 16, sub-s. 3, of the Act of 1887, and a passage in the judgment of FitzGibbon L.J. in *In re Pentland's Estate* (1, where the learned Lord Justice, in dealing

(1) 22 L. R. Ir. 649. (2) 31 I. L. T. R. 114.

with the sub-section (p. 653), says:—"That sub-section deals, in one confused sentence, with two distinct cases—first, where an apportionment has been made; secondly, where there has been no apportionment. In the first case the Commission shall order the redemption, either of the whole rentcharge, or of an apportioned part thereof, on the application of the person entitled to the apportioned part. That is to say, any person whose rentcharge is apportioned may, in analogy to the case of an owner whose property is cut up by a railway, require that the whole of it shall be bought from him, or he may sell only so much as is necessary to effectuate the required sale by the Commission." And further on (p. 654) he says:—"When an apportionment is made, discretionary jurisdiction is given to redeem the whole or only the apportioned part; but the owner of an apportioned annual charge can insist on the redemption of the whole."

Now, that last statement was, of course, a mere obiter dictum, as the question did not arise in that case, nor was it discussed in argument, because the owner of the rent there was insisting on apportionment, and if the learned Lord Justice intended his dictum to apply, as I think he did, only to cases analogous to the railway cutting cases, where the part cut off was trivial in quantity and rendered practically valueless, I think the dictum is founded on justice and good sense, and ought to be applied in such cases, whether as a matter of right or of justice. But if the dictum were intended to be of general application, as Mr. Jellett contends, I respectfully disagree with it.

A later case of *In re Hungerford* (1) (the head-note in that case being entirely inaccurate) is an illustration of the sound application of the dictum in its limited sense. In that case where all the lands liable to a superior rent of £35 2*s.* 6*d.* were sold, except a graveyard, and the vendor applied to apportion the rent by placing £33 12*s.* 6*d.* on the lands sold, and £1 10*s.* on the graveyard, Mr. Commissioner Lynch, in the exercise of his discretionary power, ordered the redemption of the whole rent.

Let us look at sect. 16 of the Act of 1887. Under sub-ss. 1 and 2, the Court has power to apportion any annuity, rentcharge, or rent without the consent of the owner thereof, and, when

(1) 31 I. L. T. R. 114.

Wylie J. 1916.

In re Barry's Estate.

apportioned, the part apportioned on the land sold is to be deemed alone the annuity, rentcharge, or rent chargeable on the land sold, and is to cease to affect the land, and to be a charge on the purchase-money, the purchase-money being paid into bank under sect. 14, and an order made attaching to it the claims of all persons interested in the land. Such being the case, we have to consider the meaning and effect of sect. 16, sub-s. 3. The words are as follows:—"The Land Commission shall, on the application of the person entitled to a part of an annuity, rentcharge, or rent, which part shall have been apportioned by them upon the land sold, and may, if they think it expedient, without such application, order the redemption of such annuity, rentcharge, or rent, or of an apportioned part thereof, and may, notwithstanding the fact that no apportionment has been made, order the redemption of any annuity, rentcharge, or rent affecting land sold." It is plain from the use of the words "shall" and "may" in the different parts of this sub-section, that one part is imperative, and the other is discretionary. The imperative part read by itself is, "the Land Commission shall, on the application of the person entitled to a part of an annuity, rentcharge, or rent, apportioned upon land sold, order the redemption of such annuity, rentcharge, or rent" (it does not stop there), "or of an apportioned part thereof." Therefore, what is imperative is, one or other of two alternatives. That is all the owner is entitled to require. If he gets the first, he does not need the second. If he gets the second, he has no right to require the first. But under the discretionary parts of the sub-section, the Court may, in any proper case, whether apportionment has been made or not, redeem the whole rent. If the owner of a superior rent had the right now claimed, it would render the powers of apportionment useless, because it would be absurd to apportion a rent, if the owner could, upon apportionment being made, nullify the order for apportionment by requiring the whole rent to be redeemed, and in the very common case of a rent being payable by several estates in the hands of different owners, subject to different outgoings and charges, the result would be that the owner of the first estate sold might be compelled to redeem the whole rent, or leave the entire purchase-money in Court, and thereby the very object for which the powers of

apportionment were given would be defeated, and distribution rendered practically impossible.

The application in this case is to apportion the rent of £27 18*s.* 8*d.*, and to redeem such part as may be apportioned on the lands sold. That, as I have said, should be done as a matter of course, unless there are special circumstances which render it expedient to redeem the whole rent.

The only ground suggested by the owner of the rent against apportionment was that, if apportioned according to the valuation of the lands, the sum of £12 10*s.* that would be left upon the lands unsold is so small that it would be much depreciated in value. That rent of £12 10*s.* would be secured upon an annual valuation of £155, and I venture to think that there would be more competition for a rent like that so well secured than for a much larger rent. The rent apportioned by the Court of Appeal in *In re Pentland's Estate* (1) was only £24 odd. I can see nothing in this case to justify me in redeeming the whole rent against the wish of the committee of the lunatic, acting under the direction of the Lord Chancellor. But I think there are circumstances which would make it inexpedient and unjust to redeem the whole. The redemption-price of the lower rent out of which this rent is wholly or in part to be redeemed was £1140. That sum was in due course properly invested in £1446 5*s.* 6*d.* India 3 per cent. stock. That that was a good investment is shown by the fact that the annual income thereof, £43 7*s.* 9*d.*, exceeds the rent by £1 3*s.* 5*d.*, but, owing to the great fall in the capital value of all securities, a forced sale now of a sufficient amount of this India stock to satisfy the redemption-price of this entire rent would involve a great loss to the owner of the stock, for, though stock has fallen so much in capital value, the owner has suffered no loss of income.

In my opinion, therefore, this rent should be apportioned in the ordinary way, and the apportioned part redeemed. The proper amount to be apportioned on the lands sold I make out to be £15 8*s.* 8*d.*, leaving £12 10*s.* on the lands unsold.

The only question remaining is the mode of fixing the redemption-price of this £15 8*s.* 8*d.* In dealing with this

(1) 22 L. R. Ir. 649.

Wylie J. 1916. *In re* BARRY'S ESTATE.

Mr. Jellett put forward, with some persistency, another extraordinary claim. His client has been paid and accepted his rent in full up to the present time; and he now claims to be entitled to be paid in cash the same number of years' purchase of the £15 8*s.* 8*d.* as was given to the owner of the lower rent in January, 1910, viz. about twenty-seven. In other words, he claims to be entitled to the same proportion of the £1140 as £15 8*s.* 8*d.* bears to £42 4*s.* 4*d.*, but he refuses to take a like proportion of the £1446 5*s.* 6*d.* India stock. Or, to put it otherwise, he claims to be part owner since January, 1910, of the sum of £1140, but he refuses to be bound either by the income it produced during the four years it was on deposit receipt or by its investment in India stock, and claims now his share of it in cash, though he has been paid and accepted his rent in full up to date. In January, 1910, the highest price usually given for the best-secured head-rents in this Court was twenty-seven to twenty-seven and a half years' purchase. The highest price usually given now, and for six or eight months past, is from twenty-two and a half to twenty-three years' purchase. The scale of prices is so well known to those practising in this Court that I venture to say, in most cases, the practitioners familiar with the facts in any particular case could tell beforehand to about a pound what the redemption-price would be.

In this case I fix the redemption-price of £15 8*s.* 8*d.* at £350.

J. E. W.

Oct. 31.

The owner of the superior rent appealed (1) in person.

Norwood K.C. for the respondent, the owner of the redemption-price of the immediate head-rent, was not called on.

The appeal was dismissed.

Solicitors for the owner of the redemption-price of the immediate head-rent: *Babington & Clarke.*

Solicitor for the owner of the superior head-rent: *A. G. Joyce.*

Solicitor for the vendor: *F. Hall.*

(1) In the Court of Appeal, before THE MASTER OF THE ROLLS, and RONAN and MOLONY L.JJ.

IN RE JOHN CHRISTIE, DECEASED.
CHRISTIE *v.* CHRISTIE.

(1915. No. 777.)

M. R.
1916.
March 3, 9, 10, 22.
June 14.

Statute of Limitations—Intestacy—Next-of-Kin in Possession—Other Next-of-Kin out of Possession for more than Twelve Years—Joint Tenancy in Acquired Shares—Partnership—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 20, *sub-s.* 3—*Partners as to Profits—Purchase of other Land out of Profits made by use of Land held in Co-ownership—Tenancy in Common of Purchased Lands.*

Two of the next-of-kin of the yearly tenant of a farm, who died intestate, acquired a title under the Statute of Limitations to the shares of the other next-of-kin. They worked the farm together, and treated the profits as divisible equally between them. They subsequently purchased four other farms with the profits made out of the original farm, and worked them in the same way. Two of the farms were purchased before the Partnership Act, 1890, came into operation, and two after that date. All the farms were bought out under the Land Purchase Acts, and were registered subject to equities, four in the name of one, and one in the joint names of the two. On the death of one intestate the survivor took out administration to him. An action was afterwards brought to administer his estate by one of his next-of-kin. A question arose in the administration, viz., whether the farms were held by the two as tenants in common, or as joint tenants.

Held (1), that the original farm was held as to the original shares of the two next-of-kin by the plaintiff and the defendant as tenants in common, and as to the acquired shares by them as joint tenants.

Smith v. *Savage*, [1906] 1 I. R. 469, followed.

(2) That the farms purchased with the profits of the original farm were held by the plaintiff and the defendant as tenants in common, and that sect. 20 of the Partnership Act, 1890, did not apply.

ADJOURNED MEMORANDUM.

This was an action to administer the personal estate of John Christie. The plaintiff William Christie, the defendant Joseph Christie, and the deceased Joseph Christie were brothers. The plaintiff sued as one of the next-of-kin of John Christie, and the defendant Joseph Christie was his administrator. The facts of

M. R. 1916.

CHRISTIE v. CHRISTIE.

the case, as stated in the judgment of O'Connor M.R., were as follows:—

"This case came before the Court on a memorandum lodged by the plaintiff for the purpose of determining whether Joseph Christie, the defendant, was a joint tenant or a tenant in common with his deceased brother, John Christie, of certain farms of lands, or whether he was a joint tenant of certain shares in the lands, and a tenant in common of other shares therein.

"The facts are these:—Joseph Christie the elder died some forty years ago intestate, leaving his widow and five children surviving. The five children were John Christie (the deceased in the present matter), William Christie (the plaintiff), Joseph Christie (the defendant), and Jane Christie, who married a man named Taylor.

"Joseph Christie, senior, was at his death the tenant from year to year of a farm in the townland of Ballyportery South, barony of Upper Dunluce, County Antrim. Letters of administration to his estate were not taken out; but if the estate had been duly administered, the farm would, subject to the payment of debts and testamentary expenses, have devolved on the widow and children in the proportion of one-third for the widow and one-fifth of two-thirds for each of the children.

"Previous to the father's death William Christie had emigrated. The remaining members of the family continued to live on the farm, and, as the law has been settled, the widow and children were tenants in common of the farm in the shares I have mentioned.

"Over thirty years ago the son James left the parental homestead, having got married and set up in a farm of his own. There is no legal evidence that his claim on his father's assets was satisfied; but he never afterwards made any claim against the parental farm, and any title he had became barred by time.

"The daughter, Jane Christie, also got married over thirty years ago. It is stated that on her marriage she got her share of her father's assets. It is more than likely that she received something equivalent to her share. In any case, her claim also became barred by time.

"This left the widow of Joseph Christie, senior, and his two

sons, John, the deceased in this matter, and Joseph, the defendant, the sole occupiers of the farm.

"In the course of time the widow died, leaving John and Joseph in sole possession, and they during their joint lives became the sole owners of the entire farm as to some shares as next-of-kin of their father and their mother, as to other shares possibly as purchasers, but, so far as the evidence goes, under the Statute of Limitations. At any rate, they became the sole owners, and there was no person could disturb their possession. They worked the farm together, they lived together, supported themselves out of the profits, and they treated the profits as equally divisible between them; but there never was any actual division of profits or any accounts kept. John was the more active man. He bought and sold the stock and produce. Joseph looked after the domestic concerns.

"They appear to have spent very little, because they accumulated profits, and out of the profits four other farms were purchased. Three of these were purchased in the name of John, and were conveyed to him solely, and one was conveyed to John and Joseph jointly.

"Nothing turns on the forms of the conveyances, the only question being whether in equity the brothers were joint tenants or tenants in common.

"This is the state of affairs that had been constituted at the death of John Christie, which occurred on the 16th December, 1913. The defendant, Joseph Christie, took out a grant of letters of administration to his estate, and William, who is the brother who emigrated during his father's life, instituted the present action for the administration of the personal estate of John Christie."

The following additional facts are taken from the affidavits filed in the action. An order for administration was made on November 5th, 1915, and the usual accounts and inquiries were directed.

The question arose before the Chief Clerk as to what was the share of the deceased, John Christie, in the farms; and on February 15th, 1916, a memorandum was lodged on behalf of the plaintiff, requesting a declaration by the judge at chambers as follows:—

1. That upon the facts set forth in the several affidavits, filed

M. R. 1916. CHRISTIE v. CHRISTIE.

on behalf of the plaintiff and of the defendant, respectively, in this action, the above-named deceased and the defendant should be deemed not to have been joint tenants at the death of the said deceased of any of the lands referred to in the first schedule to the affidavit of the defendant, verifying account "A," or of any portion of the said lands, but to have been tenants in common in equal shares of all the said lands.

2. That one undivided moiety of all the said lands forms portion of the estate of the said deceased.

When the memorandum came on for hearing, it was adjourned into Court.

The lands referred to in the first schedule of the said affidavit, which was filed on January 1st, 1916, were as follows:—

1. The original farm, which had belonged to Joseph Christie, the elder, in Ballyportery South, containing 34A. 3R. 15P., vested in John Christie by order of the Irish Land Commission, dated April 25th, 1894, and subject to an annuity of £13 12*s.*, since reduced to £10 19*s.* 6*d.*, payable to the Irish Land Commission for forty-nine years from November 1st, 1893, and registered on May 1st, 1894, under the Local Registration of Title (Ireland) Act, 1891, in the name of John Christie, subject to equities.

2. Part of the lands of Mount Hamilton, containing 37A. 1R. 10P. This farm was bought in 1883 from R. Campbell, the then tenant, by John Christie, and bought out by him in 1905, subject to a like annuity of £4 9*s.* 6*d.*, and registered in his name on March 31st, 1905, in like manner, subject to equities.

3. A farm in Ballyportery North, containing 31A. 3R. 20P. John Christie purchased the tenant's interest in this farm about the year 1887, and bought it out in 1894, subject to a like annuity of £12 19*s.* 2*d.*, and registered in his name on May 1st, 1894, subject to equities.

4. A farm in Ballyportery South, containing 31A. 2R. 3P., comprised in a Vesting Order of the Irish Land Commission, dated July 20th, 1894, subject to a like annuity of £15 1*s.* 8*d.*, and registered on July 30th, 1894, subject to equities. On March 7th, 1909, John Christie bought this farm at an auction from David Coleman. It was conveyed to John Christie and Joseph Christie,

and registered in their joint names, subject to equities, instead of in the name of John only, because part of the purchase-money was to be secured by a mortgage, and the personal security of the two was required.

5. A farm in Ballyportery South, containing 11A. and 5P., comprised in a Vesting Order of the Irish Land Commission, subject to an annuity of £4 1*s.* 8*d.*, and registered under the Local Registration of Title (Ireland) Act, 1891, subject to equities, and afterwards bought by John Christie, and registered in his name on April 27th, 1898.

The defendant in the schedule of assets sworn by him when applying for a grant of administration to John Christie stated that John Christie owned only one half of the interest in each of the farms, he and John Christie being tenants in common of them. When an offer to settle was refused by the plaintiff, the defendant stood on his rights and made the present claim. The only evidence as to the history of the original farm was contained in the affidavit of the defendant filed November 1st, 1915. He then stated that his brother James Christie married over thirty years ago, and with the provision made by John Christie or Joseph Christie, deceased, and himself James Christie was established in a farm of his own; that Jane Christie was married over thirty years ago, and received her share of his father's estate from Joseph Christie, deceased, and himself.

The other facts stated in the affidavit are summarized in the judgment as above set out.

Serjeant Matheson K.C. and *M'Cutcheon* for the plaintiff:—

The contention on the part of the plaintiff is that all the farms were held by the deceased John Christie, and the defendant Joseph Christie, as tenants in common, and that John Christie was entitled to a moiety. The contention on the part of the defendant is, that, as regards two-fifths of the original farm, the deceased and the defendant were tenants in common, but that they were joint tenants as to three-fifths. As regards the purchased farms, the contention on the part of the defendant is that they were held in the same way as the original farm,

M. R. 1916.

CHRISTIE v. CHRISTIE.

namely, as to two-fifths in common, and as to three-fifths in joint tenancy.

Joseph Christie the elder having died intestate, his widow became entitled to one-third share of the farm, being personal estate, and each of the five children to one-fifth of two-thirds, that is, to two-fifteenths. The plaintiff emigrated to America before his father's death; his brother James Christie married, and went to live on a farm of his own; Jane Christie married, and received a share of her father's assets. There is no legal evidence that the plaintiff received his share of his father's assets; but as regards James and Jane, the facts stated in the affidavit show that they received their respective shares of their father's assets from John and Joseph. John and Joseph lived with the widow on the farm, and after her death they worked the farm together, and treated the profits as divisible between them equally. The widow having died intestate, her one-third share of the original farm was divisible between her five children equally, *i.e.*, one-fifth each, *i.e.*, one-fifteenth of the whole. Thus John and Joseph became entitled in respect of the assets of their father and mother to three-fifteenths, or one-fifth each.

John Christie became the legal owner of the original farm; but the registration in his name was subject to equities, *i.e.*, to the defendant's right to a share of it.

The right of the plaintiff, and of James and Jane, to a third of their father's and mother's assets, is barred by lapse of time, so that the original farm was the property of John and Joseph. They were partners in a farming business, and the original farm formed part of the property of the partnership, and, that being so, they held the whole as tenants in common. So with the purchased farms; they were worked as part of the farming business, and were held in the same way as the original farm, that is, in common in equal shares. Reliance may be placed on sect. 20 of the Partnership Act, 1890, but that Act made no important change in the law, save in respect of the mode of making a partner's share of the partnership assets available for the payment of his separate judgment debts: Lindley on Partnership, 8th ed., p. 3. It will be contended that the original farm was not partnership property, but that the only partnership was in the profits made

out of it. But it is for the partners to determine by agreement amongst themselves what shall be the property of the firm, and what shall be the separate property of one or more of them: Lindley on Partnership, 8th ed., p. 384.

The inference to be drawn from the evidence is that they regarded all the farms as partnership property. The principal rules to be deduced from the cases on the subject are incorporated in sects. 20 and 21 of the Act of 1890, but the ultimate test is the agreement of the parties: Lindley on Partnership, 8th ed., p. 385. Reliance will be placed on sect. 20, sub-s. 3, which provides that "where co-owners of an estate or interest in any land, or in Scotland in any heritable estate, not being itself partnership property, are partners as to profits made by use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them in the absence of an agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase."

It will be argued that this sub-section applies here, as the original farm was not partnership property, and that the farms purchased with the profits belong to the co-owners for the same interest for which the original farm was held, viz., as to two-fifths as tenants in common, and as to three-fifths as joint tenants. But this section is only declaratory of the law. *Morris* v. *Barrett* (1) shows that the purchased farms were partnership property, although the original farm may not be. In that case lands were devised to two persons as joint tenants; they farmed the lands together, and kept their money in one common stock, and out of that bought other lands, which were conveyed to one of them only, but were farmed by both. It was held that the devised farms were not partnership property, but that the purchased farms were. That is very like the present case. In *Jackson* v. *Jackson* (2), there cited, Lord Eldon held that, where a testator devised to his two sons jointly his trading business, and lands used by him for the purpose of carrying it on, and the sons

(1) 3 Y. & C. 384. (2) 9 Ves. 591.

M. R. 1916. CHRISTIE v CHRISTIE.

took the business and carried it on in partnership, the lands formed part of the partnership property, and did not belong to the sons as joint tenants. In *Darby* v. *Darby* (1) two persons purchased freehold land on a joint speculation with their joint moneys for the purpose of laying it out in building-plots, and reselling it at their joint profit or loss, and it was held by Kindersley V.-C. that the land was of the very essence of the thing to be dealt with, and was, therefore, converted out and out.

In *Waterer* v. *Waterer* (2), the case of a nursery gardener's business, James L.J. says that it is immaterial how the land may have been acquired by the partners, whether by descent or devise, if in fact it was substantially involved in the business.

Davies v. *Games* (3) is to the same effect. There a nephew and his two uncles were tenants in common of a farm, and carried on a farming business together. The nephew conveyed his one-third to his uncles as joint tenants, and they continued to carry on the business. Hall V.-C. held that the one-third share became involved in partnership dealings, and must be regarded as partnership property, and did not pass to the surviving uncle as joint tenant. *Morris* v. *Barrett* (4) was there followed. *Davis* v. *Davis* (5) may be relied on by the other side. That was a decision since the Partnership Act, 1890. Two brothers carrying on business as patent fan manufacturers, borrowed money on the security of freehold premises of which they were tenants in common, and expended the money in adding a part of the premises, which was let to a tenant, to adjoining workshops in which the business was carried on, and of which they were tenants in common.

There was no agreement for a partnership, and no accounts were kept, each brother drawing an equal sum from the business for his own use. One of the brothers died intestate, leaving his brother (the plaintiff) his heir-at-law, and a widow and a sister. North J. held that the brothers were partners as regards the business, but that they were not partners in the land. The authorities from *Morris* v. *Barrett* (4) to *Davies* v. *Games* (3) are there discussed, and sects. 1, 2, and 20, sub-s. 3, of the Act of 1890 are referred to. North J. there said that if the added premises had been bought

(1) 3 Drew. 495. (2) 15 Eq. 402. (3) 12 Ch. D. 813.
(4) 3 Y. & C. 384. (5) [1894] 1 Ch. 393.

the case would have come within sect. 20, sub-s. 3, and that the same law applied to it. He found there, however, that the house was not more fitted than any others for the carrying on of the business, and, therefore, was not involved in the partnership dealings in such a way as to become partnership property. That case is distinguishable on this point from the present, as here the profits were made out of the land, and it is an authority in favour of the plaintiff on the first point, namely, that a partnership may be inferred from the conduct of the partners. In *Jeffereys* v. *Small* (1), decided so far back as 1683, it was held that where two persons jointly stocked a farm and occupied it as joint tenants, there was no survivorship. So in 1791 in *Elliott* v. *Brown* (2) Lord Thurlow granted an injunction to restrain a surviving partner from proceeding to eject a farm of which a joint lease had been made to himself and his deceased partner, the lease being accessory to the trade in which the partners were embarked. Reference was also made to the notes to *Lake* v. *Gibson* (3) in 2nd White and Tudor's Equity Cases (7th ed.), p. 961.

Sect. 21 of the Partnership Act, 1890, enacts that "unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm." That applies here.

S. L. Brown K.C. and *Megaw*, for the defendants:—

Elliot v. *Brown* (2) must have been decided on a question of fact. The property there was acquired for the purpose of the partnership, which is not the case here. Anything that took place after the death of John Christie must be disregarded, *e.g.*, the statement in the schedule of his assets by the defendant as his executor, that he held the farms as tenant in common. That is not an estoppel. It is at most evidence of a severance of the joint tenancy in his lifetime. John Christie and Joseph Christie were entitled to two-fifths of the original farm as tenants in common, and the three-fifths as joint tenants. The plaintiff went away in his father's lifetime. The others lived together on the farm after the father's death. There was no partnership between the widow and the children. The farm never became partnership property.

(1) 1 Vern. 217.
(2) 3 Swans. 489 (n.).
(3) 1 Eq. Ca. Abr. 194.

M. R. 1916. CHRISTIE v. CHRISTIE.

Even after the death of the widow John and Joseph were only joint tenants. They had a common purse, but that did not make them partners. There is no evidence that the plaintiff's share was purchased by John and Joseph. They acquired his share, and those of James and Jane, under the Statute of Limitations, and in no other way. *Ward* v. *Ward* (1) is a direct authority. Lord Hatherley there decided that two persons who acquired shares in a copyhold by virtue of the Statute of Limitations took those shares as joint tenants, and that all went to the survivor. The possession there was wrongful as here. The parties there, Robert Ward and B. E. Ward, were rightfully in possession until the death of Rebecca Ward, but upon her death their possession became wrongful, and the contention of plaintiff there, as here, was that the two were tenants in common, and that she was entitled to a share of the one who died first. This was considered the law in England, but there was some doubt on the point in Ireland till *Smith* v. *Savage* (2), where the net point arose. Barton J. there held that the next-of-kin of a yearly tenant of a farm who died intestate, remaining in possession of the farm for over twelve years, acquired under the Statute of Limitations the shares of the other next-of-kin who remained out of possession for over that period as joint tenants, and not as tenants in common.

[O'CONNOR M.R.: I am bound by that case, and unless it is taken out of it by the partnership point.]

The case is like *Ward* v. *Ward* (1). There never was a partnership here; it was only the case of a family living together, and having a common purse. *Morris* v. *Barrett* (3) and *Davis* v. *Davis* (4) are in our favour as regards the original farm. As to the purchased farms, were they partnership property? It might be argued on the facts that the plaintiff and defendant were equitable joint tenants, and therefore Joseph was entitled as survivor.

The four farms were registered under the Local Registration of Title Act, 1891, one in the joint names of John and Joseph, and three in the sole name of John, subject in each case to equities. No copies of the conveyances to them are forthcoming.

[O'CONNOR M.R.: There would be no *jus accrescendi* if they were partnership property.]

(1) L. R. 6 Ch. 789.
(2) [1906] 1 I. R. 469.
(3) 3 Y. & C. 384.
(4) [1894] 1 Ch. 393.

If there was a partnership as to the profits of the original farm, *Morris* v. *Barrett* (1) would be an authority that the farms bought with the profits were partnership property. But sect. 20 (3) of the Partnership Act, 1890, altered the law in this respect, and made the purchased farms to be held in the same way as the original farm. The language of the statute is to be looked at, not the previous decisions: *Bank of England* v. *Vagliano* (2), a case on the construction of sect. 7 (3) of the Bills of Exchange Act, 1882. The section applies, although some of the farms were bought before it came into operation, but it only applies here if there was a partnership in the profits of the original farm, but there was no such partnership. There must be a joint enterprise or speculation to make a partnership. Partnership is defined by sect. 1 of the Act as "the relation which exists between persons carrying on a business in common with a view of profit," and sect. 2 provides that "joint tenancy or tenancy in common does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof." *Morris* v. *Barrett* (1) would be difficult to distinguish but for the Partnership Act; but sect. 20, sub-s. 3, of the Act altered the law. Even if there was a partnership as to the profits of the original farm, there was no partnership as to the farm, and, therefore, the plaintiff and defendant held the purchased farms in the same way as the original farm, namely, two-fifths as tenants in common, and three-fifths as joint tenants.

M'Cutcheon, in reply:—

The arguments for the defendant are not consistent. It is said that sect. 20, sub-s. 3, of the Partnership Act altered the law, and that no regard is to be had to the previous decisions, but, on the other hand, it is sought to apply the Acts to the farms bought before the Act came into operation, the 1st January, 1891, as being merely declaratory of the law. If sect. 20, sub-s. 3, altered the law, that would be noted in Lindley on Partnership; but the view of the author of that work is that sects. 20 and 21 (which must be read together) merely incorporate the principal rules to

(1) 3 Y. & C. 384. (2) [1891] A. C. 144.

M. R. 1916. CHRISTIE v. CHRISTIE.

be deduced from the previous cases: Lindley on Partnership, 8th ed., p. 384. Sect. 21 provides that "unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm." Sect. 20, sub-s. 3, deals with a special case. The words "to be used in like manner" imply an agreement between the partners to hold the purchased property in the same way as the original property, and not as partnership property; but no such agreement can be inferred in the present case. In Lindley on Partnership, 8th ed., pp. 394–96, the cases, in which co-owners were partners in the profits derived from land held as common property, from *Jackson* v. *Jackson* (1) to *Davis* v. *Davis* (2), are discussed. The agreement of the partners is there treated as the governing fact. It need not be express, but may be implied from the conduct of the parties. The partnership included the land as well as the profits. He referred to the affidavit of the defendant, Joseph Christie, filed the 1st November, 1915. It makes no difference to the equitable rights of the partners that one of the farms was registered in the joint names, and the others in the name of one only.

The enactment in sect. 64, sub-s. 2, of the Local Registration of Title Act, 1891, that, where two or more persons are registered as owners of the same land, they shall be deemed to be joint tenants, unless there is an entry in the register to the effect that they are tenants in common, only affects the legal title. All the farms, save one, were registered in the name of John only, and are claimed by the defendant as joint property, so that the defendant cannot claim the farm registered in the joint names of John and Joseph as survivor. It was bought in the same way by John, but it was registered in the two names because it was to be mortgaged, and the personal security of both John and Joseph was required. *Davies* v. *Games* (3) is an authority in our favour. It was a case of carrying on a farming business without accounts, and without any defined capital, and the lands were held to have become partnership property by the conduct of the parties, though the legal estate in one share was held by the

(1) 9 Ves. 591. (2) [1894] 1 Ch. 393. (3) 12 Ch. D. 813.

partners as joint tenants. In the circumstances all the farms should in equity be treated as on an equal footing.

M. R.
1916.
CHRISTIE
v.
CHRISTIE.

As regards the original farm, John and Joseph bought out the shares of their brother James and their sister Jane with the profits made out of the farm, and that shows that they were partners in the farm. *Jackson* v. *Jackson* (1) is in our favour on this point.

Sect. 2 of the Partnership Act, 1890, which is only declaratory of the law, enacts that joint ownership does not of itself make a partnership, but, if the land becomes involved in the partnership, it becomes partnership property. Even if there was only a partnership in the profits of the original farm, the farms purchased with the profits were partnership property.

June 14.

O'CONNOR M.R., having stated the facts as above, proceeded as follows:—

The plaintiff, as one of the next-of-kin of John Christie, deceased, contends that the deceased and Joseph were tenants in common in equal shares of all the lands comprising the parental homestead and the acquired farms.

Joseph Christie on the other hand contends that as to three-fifths shares of the parental homestead he was joint tenant with the deceased, and is now sole owner of this three-fifths by survivorship. He admits a tenancy in common with the deceased in two-fifths. Joseph Christie further contends that he was joint tenant with the deceased of all the acquired farms, and is now sole owner of these by survivorship. This is the issue between the plaintiff and the defendant.

It will be convenient if I first explain the principle on which the defendant makes title to the exclusive ownership of three-fifths share of the parental homestead, and to a tenancy in common with the deceased in the remaining two-fifths. As I understood the statement of counsel, it is in this way:—As one of the five children of his father his share as a next-of-kin was one-fifth of two-thirds, equal to two-fifteenths. As one of the five children of his mother his share as one of her next-of-kin was one-fifth of one-third, equal to one-fifteenth. Both shares are equal to one-fifth

(1) 9 Ves. 591.

M. R. 1916. CHRISTIE v. CHRISTIE.

which he acquired through father and mother. His deceased brother, John, in the same way acquired one-fifth, and, as the shares of next-of-kin are held in common, and not in joint-tenancy, there is no survivorship. But the defendant Joseph Christie says that the title to the remaining three-fifths was acquired by himself and John jointly by the Statute of Limitations, and that it is settled by authority that when persons in joint possession of certain shares of land so acquire title to other shares, they acquire them and hold them as joint tenants, unless there has been a severance, either by conveyance or by agreement, and that there has been no such severance in the present case.

The authority on which he relies is *Ward* v. *Ward* (1). The title dealt with in that case is somewhat involved, but the point of the case is this:—Two persons were in joint possession of lands under a good title. That title expired by the death of a life owner, through whom they claimed. They then became entitled in possession as tenants in common of certain shares in the lands, but continued to hold possession of the entire, to the exclusion of an outside party, who was entitled to another share, and acquired a title to that share by remaining in possession of it for more than twenty years. The question then arose whether the title to the share acquired by possession was of the same character as that by which they held the shares which they originally held by lawful title, viz., by a tenancy in common, or whether it was held in joint tenancy.

Lord Hatherley, in giving judgment, said: "Now, suppose it had been the simple case of a farm wrongfully entered into by two persons, then, according to the passages cited from *Coke* upon *Littleton*, they would, being disseissors, enter as joint tenants, and would acquire seisin as such. Here two persons are in lawful possession of a copyhold; the title under which they hold it comes to an end, but they continue in possession, and they go on holding a certain share of the property without any title whatsoever. In what capacity do they so hold on? It appears to me as joint tenants. The possession of each became wrongful as to this share at the same moment of time, so that they acquired

(1) L. R. 6 Ch. 789.

their title at the same moment of time, they held by common right, or by one common wrongful title, whichever you please to call it, and they have done nothing to sever their tenancy. The case is very analogous to that of one of three tenants in common conveying his share to the other two, without words of severance. The two are joint tenants of the shares conveyed, though they remain tenants in common of their original shares."

This seems to me a case on all fours with the present one.

That case was followed and approved by Barton J. in *Smith* v. *Savage* (1). There, certain of the next-of-kin of the deceased owner of a chattel real had exclusive possession of the entire for more than twelve years. It was held that as to their original shares as next-of-kin they were tenants in common, but that as to the shares of the other next-of-kin which they acquired by possession they were joint tenants. Barton J. said:—"In my opinion, the next-of-kin who remained in possession continued to be tenants in common as to their original shares, but acquired title to the shares of the absent ones as joint tenants. Sect. 12 of the Real Property Limitation Act, 1833, abolished, for the purpose of the Statute of Limitations, the old doctrine that the possession of one tenant in common is the possession of all. That section has the effect of making the possession by the next-of-kin who remain in occupation of the share of an absent one, separate or adverse in respect of such shares. Accordingly, we have in such a case some of the next-of-kin taking, at the same moment of time, and by one common wrongful title, wrongful possession of the share of the absent one, and continuing in possession for the statutory period. All the requisites of a joint tenancy seem to be present. The case of *Ward* v. *Ward* (2), although not identical in its facts, seems in principle to be indistinguishable. That was a decision of the Court of Appeal in England in which Lord Hatherley delivered the judgment of the Court. At p. 792 Lord Hatherley referred to an analogous case. He said:—"The case is very analogous to that of one of three tenants in common, conveying his share to the other two without words of severance. They are joint tenants of the share so conveyed, though they remain tenants in common as to their original shares. Accordingly, I hold that

(1) [1906] 1 I. R. 469. (2) L. R. 6 Ch. 789.

M. R. 1916. CHRISTIE *v.* CHRISTIE.

the next-of-kin who remained in possession acquired the shares of the absent ones as joint tenants, although they continued to be tenants in common in respect of their original shares."

On these authorities I must hold that the defendant Joseph Christie held two-fifths share of the parental farm as a tenant in common with John Christie, and that they acquired the remaining three-fifths shares as joint tenants.

There is, however, an element in the case which raises the question whether the joint tenancy acquired as I have mentioned was severed by the dealing with the lands. The same question would arise in connexion with the acquired farms if they also were originally acquired in joint tenancy. The element I refer to is the joint farming of all the lands by the two brothers. It is said that they were carrying on a business, and thus trading in partnership, and that the capital involved in the partnership was represented by the land as well as the stock. Let us see then how the law of partnership affects the case.

As I understand the law of partnership it does not necessarily follow from the carrying on of a business by two or more persons in partnership on certain premises, the property of the partners, that these premises become partnership property. To make them such the premises must be brought into the common stock of the partnership. They may or they may not so be, according to the agreement of the partners, and any person asserting such an agreement must prove it, either by giving direct evidence of the agreement, or proving a course of dealing from which the inference is to be drawn. This was the law before the Partnership Act, 1890, and in this respect the law was not altered by the Act but confirmed: *Davis* v. *Davis* (1). Now, I see nothing in the present case which leads to the conclusion that the two brothers, who jointly farmed the lands, ever agreed that they should bring them into the common stock of partnership between them. There is no direct evidence that they did so, and there is no such inference to be drawn from necessity or convenience. I know no case in which it was decided that the mere fact of farming lands by two or more persons, who divided the profits between them, made the lands partnership property.

(1) [1894] 1 Ch. 393.

Jackson v. *Jackson* (1) was, no doubt, cited in support of this view. There there was a residuary devise and bequest of lands and personal estate by a testator to his two sons as joint tenants. The lands and personal estate had been used for trade purposes, and the sons after their father's death traded together with the property for a period of twelve years. It was held that there was a severance of the joint tenancy in the lands because they were involved in the partnership between the brothers. But the case was a very complicated one, and depended upon a number of special circumstances which are not fully stated in the report. The judgment was Lord Eldon's, and the reporter, at page 595, prefaces his report of it by the introductory words: "After stating the will and circumstances in evidence very particularly." The judgment therefore depended on special circumstances, which proved to Lord Eldon's satisfaction that there was in fact, although there may not have been any express agreement on the point, an understanding between the sons that there should be a severance. The latter part of the judgment shows this, because he said: "Their various transactions afford decisive evidence, which it would be too dangerous to permit one to contradict after the death of the other, that they meant to be considered tenants in common of the interest they took in the trading part of their father's concern." Lord Eldon's judgment is therefore no authority for holding that carrying on a business on lands of itself makes the lands partnership property. Indeed there is modern authority that this is not the law. In *Davis* v. *Davis* (2) North J. says: "It is not the law that partners in business, who are the owners of the property by means of which the business is carried on, are necessarily partners as regards that property." He then instances cases in which persons carrying on a business were held to be partners, but not partners in all the property used in the business. He also cites *Davies* v. *Games* (3), in which the business carried on was that of farmers. There three brothers, tenants in common of a farm, carried on a farming business together. One brother died, having devised his one-third share to a nephew, and he and the surviving brothers, B. and W., continued to carry on the

(1) 7 Ves. 535; 9 Ves. 591.
(2) [1894] 1 Ch. 401.
(3) 10 Ch. D. 813.

M. R. 1916.

CHRISTIE v. CHRISTIE.

farming business. The nephew sold his one-third share of the farm and lands to his uncles, B. and W., the conveyance being to them as joint tenants, and they continued to carry on the farming business. B. died, leaving all his property to his wife. The farm and lands were subsequently sold. W. claimed, as surviving joint tenant, the proceeds of sale representing the one-third share purchased from the nephew. It was held by Hall V.-C. that "the one-third share became involved in partnership dealings, and must be regarded as partnership property, and that W. was entitled to a moiety of the proceeds of sale." One of the circumstances relied upon by the Vice-Chancellor was that the purchase was of "a mixed property, viz., the farm and stock, a going concern." These authorities fully support the view that carrying on the business of farming by two or more persons on lands, of which they are joint owners, does not of itself make the lands partnership property.

In the present case there are no special circumstances which go to show an agreement to make the lands part of the partnership stock, and I must therefore hold that the joint tenancy, originally acquired in the three-fifth share of the parental farm, was not severed.

The same reasoning would establish a joint tenancy in the acquired farms, but in regard to these another consideration applies.

It is admitted that there was a partnership in the farming stock and the profits, and it is contended that the acquired farms having been purchased with partnership profits became partnership property. *Morris* v. *Barrett* (1) was cited in support of this contention. In that case the real and personal estate was devised by the testator to his two sons as joint tenants, and the two sons, after the father's death and during the period of twenty years, carried on the business of farmers with such estates, and kept the moneys arising therefrom in one common stock, and with part of such moneys purchased other estates in the name of one of them, but never in any manner entered into any agreement respecting such farming business or even accounted with each other. It

(1) 3 Y. & J. 384.

was held in the circumstances that they continued to be joint tenants of all the property that passed by the will, but were tenants in common of the after-acquired lands. The value of this case as an authority for the proposition that lands purchased with partnership profits are partnership property and are acquired by the purchasers as tenants in common may be weakened by the circumstance that the tenancy in common in the acquired lands was admitted by the surviving son, who was the defendant in the action, and there is no reasoned judgment reported. The admission, however, goes to show that the law as laid down was generally accepted at the time; and *Morris* v. *Barrett* (1) has, so far as I have been able to ascertain, been always accepted as an authority for the proposition that property purchased with partnership moneys becomes partnership property. In my opinion, this is now the law, except in so far as it is affected by the Partnership Act, 1890. Two of the acquired farms were purchased before the Partnership Act, and unaffected by it; and therefore I hold that they were acquired by the deceased John Christie and the defendant Joseph Christie, as tenants in common in equal shares, having been purchased out of partnership profits. Before dealing with the other acquired farms which were purchased since the passing of the Partnership Act, I find it convenient to summarize the position as it then stood.

John and Joseph Christie's titles were, according to the view I take, as follows:—They were tenants in common of two-fifths of the parental farm; they were joint tenants of three-fifths of the same farm; and they were tenants in common of two acquired farms. Subsequently to the Partnership Act they acquired two more farms out of the profits of the farms then held by them. Does the Partnership Act affect the titles to these farms? Sect. 20, sub-s. 3, is as follows:—"Where co-owners of an estate or interest in any land, or in Scotland in any heritable estate, not being itself partnership property, are partners as to profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners for the same respective estates

(1) 3 Y. & J. 384

M. R. 1916.

CHRISTIE *v.* CHRISTIE.

and interests as are held by them in the land or estate first mentioned at the date of the purchase."

This section is easily applied to a case where the partners are tenants in common or joint tenants of the lands previously held; but how is the section to be applied to a case like the present, in which the purchasers hold some lands as tenants in common and others as joint tenants? I do not think that it can be applied at all, and therefore I feel obliged to fall back on the old law that lands purchased with partnership profits are partnership property, and are held on a tenancy in common. In result then I hold that all the lands, save as to three-fifth shares in the parental homestead, were held by John and Joseph Christie as tenants in common in equal shares, and that the three-fifths was held by them as joint tenants. It would be much more satisfactory to my mind if I were able to hold that the entire was held by them as tenants in common; but I am bound to follow *Ward* v. *Ward* (1) and *Smith* v. *Savage* (2). It is inconceivable to me that John and Joseph Christie could in any circumstances agree to hold some of their shares under one title and others under another title. I am sure that if they were informed during their lives of the two distinct titles, the information would have produced bewilderment. But I am bound by authority.

The following order was made:—

This Court doth declare that John Christie, the deceased in this matter and cause, and the defendant Joseph Christie were entitled at the date of the death of the said John Christie as tenants in common in equal shares in respect of two undivided fifth shares in the farm of land situate at Ballyportery South, in the Barony of Upper Dunluce and county of Antrim, containing 34A. 3R. 15P., being the lands comprised in item No. 1 in the 1st schedule to the said affidavit of the said Joseph Christie, filed on the 4th day of January, 1916, and that the said John Christie and the said Joseph Christie were entitled at the said date as joint tenants in respect of their lands situate in Ballyportery South, Ballyportery North, and Mount Hamilton, more particularly described in items Nos. 3, 4, and 5 of the said schedule, and it is ordered that in addition to the accounts and inquiries directed by the said order, dated the 3rd day of

(1) 1 Ch. A. 789. (2) [1906] 1 I. R. 469.

November, 1915, the following further inquiries and accounts be made and taken at Chambers, that is to say :—

No. 1. An inquiry what freehold registered land the said John Christie, the intestate herein, was seised of or entitled to at the time of his death which devolved to and became vested in his personal representative under the Local Registration of Title (Ireland) Act, 1891.

No. 2. An account of the rents and profits of the intestate's freehold registered land, and by whom received.

No. 3. An inquiry what incumbrances (if any) affect the intestate's freehold registered land or any and what parts thereof. And this Court doth declare the plaintiff and the defendant entitled to their respective costs of the said memorandum and the hearing thereon, and order as part of their costs in this matter and cause, the costs of the said hearing to be taxed as the costs of an action.

Solicitors for the plaintiff : *A. Caruth & Son.*
Solicitors for the defendant : *J. & A. Caruth.*

W. L.

Appeal.
1916.
Nov. 9, 10, 27.

In re SULLIVAN (1).
SULLIVAN *v.* SULLIVAN.

(1914. No. 986.)

Will—Election—Legacy—Bequest to Wife of Legacy payable out of Shares standing in Joint Names of Husband and Wife—Bequest of Life Estate in Residue to Wife.

A testator whose property at his death (exclusive of certain stocks and shares standing in the joint names of the testator and his wife, which at his death became, by survivorship, the absolute property of his wife) amounted in value to £1858, by his will gave his wife a legacy of £3000, "same to be paid to her either in cash or in such of my shares (including shares standing in her name jointly with mine) as she may select," and directed his executors to hold the residue of his property upon trust to pay the income to his wife during her life, and after her death to apply two-thirds in favour of a brother's children, and to hold one-third on a certain educational trust.

Held, by the Court of Appeal (affirming Barton J.), that the testator's widow was bound to elect between the benefits conferred by the will, and her claim to any of the stocks and shares invested in the joint names of herself and the testator.

Appeal by the plaintiff from the judgment of Barton J., dated the 27th June, 1916 (reported [1916] 1 I. R., p. 248).

The testator, Michael Sullivan, who died on the 9th July, 1914, by his will, dated the 2nd October, 1913, after certain other legacies, bequeathed to his wife, Alice Meenan Sullivan, the sum of £3000 for her absolute use, "same to be paid to her either in cash or in such of my shares (including shares standing in her name jointly with mine) as she may select." After bequeathing certain further legacies, the testator directed his executors to hold the residue of his property, both real and personal, upon trust to pay the income thereof to his wife during her life, and after her death to apply two-thirds in favour of the children of his brother John and to apply the income of one-third in encouraging the teaching of the Irish language in the National Schools of Miltown Malbay.

(1) In the Court of Appeal, before Sir Ignatius J. O'Brien L.C., and Ronan and Moloney L.JJ.

The testator was, at the date of his death, possessed of personal estate (including shares and investments in public companies) to the value of £1858 17*s.* 2*d.*, but was not entitled to any real estate. The testator had also invested in the joint names of himself and his wife further sums of money in stocks and shares, the estimated value of which investments at the date of the testator's death being £1748 1*s.* 5*d.* It was admitted that, on the testator's death, the latter stocks and shares became the property of his widow, who brought the present action for the administration of the estate of the deceased. Barton J., by his decree, declared that the defendant was bound to make her election between the benefits conferred by the will and her claim to any of the stocks and shares invested in the joint names of the plaintiff and the testator. Hence this appeal.

S. L. Brown K. C. (*Hugh Kennedy* with him), for the appellant:—

We contend that no question of election arises. It does not appear sufficiently clear within the four corners of this will itself that the testator intended to dispose of property not his own, and evidence of such intention cannot be given *dehors* the will, although we admit that evidence is admissible as to the circumstances under which the will was made. In order that the question of election should arise, it is necessary that the gift of the other person's property should be specific; the subject-matter of the bequest must be clearly identified with the property of the person against whom it is sought to raise a case of election. Consequently election cannot arise where, as in this case, the property in question is not clearly identified, and did not, in fact, belong to such other person at the date of the will. The words "shares standing in her name jointly with mine" may as reasonably be referred to shares which the testator might have purchased subsequent to the will, and have placed in the joint names of himself and his wife, as to the shares which, in fact, became the wife's. That he did not, in fact, so purchase and deal with other shares cannot affect the construction of the will." In *Dummer* v. *Pitcher* (1) Lord Chancellor Brougham said:—"There

(1) 2 M. & K. 262, at p. 274.

Appeal. 1916.

SULLIVAN v. SULLIVAN.

is nothing more undoubted in the law than that to make a case of election the intention must appear certainly and clearly, both as to the property assumed to be disposed of, and as to the implied condition to be fulfilled. A person is not, without strong indications of such an intent, to be understood as dealing with what does not belong to him." We rely on *In re Harris*; *Leacroft* v. *Harris* (1). There is no more reason to hold that the testator here intended to deal with property not his own than there was in that case: *Coates* v. *Stevens* (2); *Attorney-General* v. *Fletcher* (3); *Shuttleworth* v. *Greaves* (4); *Grosvenor* v. *Durston* (5). The will should not be construed as if the words "including shares standing in her name jointly with mine" had been repeated in the residuary clause, and these words cannot be introduced in order to raise a case of election.

H. Wilson K.C. and *Murnaghan* (*D. S. Henry K.C.* with them):—

The will clearly raises the question of election. The plaintiff is to get £3000 in cash or in such shares, including shares standing in the joint names of herself and her husband, as she might select. She is then given an interest in the residue. The joint shares, which admittedly became the plaintiff's property, are clearly made assets for all purposes of the will, and the residuary clause cannot be construed independently of what goes before. The plaintiff cannot approbate and reprobate. No case decides that election only arises in the case of a specific bequest. No doubt the property must be sufficiently identified; but here it is so identified. To say that the testator only meant to deal with shares which he might subsequently purchase is to impute to him, in the words of Sir W. Page-Wood, V.-C., "a very whimsical intention." The judgment of Kay J. in *In re Carpenter*; *Carpenter* v. *Disney* (6) rules the present case.

(1) [1909] 2 Ch. 206.
(2) 1 Y. & C. Ex. 66.
(3) 5 L. J. Ch. 75.
(4) 4 My. & C. 35.
(5) 25 B. 97.
(6) 51 L. T. N. S. 773.

T. H. Maxwell, for the Commissioners of Charitable Donations and Bequests :—

I submit that the will must be construed as if the words "including shares standing in her name jointly with mine" had been repeated in the residuary clause. The testator gives his wife an option to take her bequest either in cash or in the shares standing in their joint names at the price of the day; and it would be going very far to suggest that the testator intended the residuary legatees to get little or nothing if the wife took the £3000 in cash, which would be the result unless he intended the shares in the joint names to be included in the bequest of the residue.

SIR IGNATIUS J. O'BRIEN L.C.:—

I do not get much assistance in this case from the authorities which have been cited. The question first to be determined is, what benefits on the construction of the whole will Michael Sullivan intended to give his wife? Taking the will as a whole, and avoiding any straining of its language, the answer appears to me to be clear. In the first place, the testator intended to give his wife £3000, and, when that was paid, apart from certain specific bequests, she was to get a life estate in the residue of his property. I refuse to dissociate the portion of the will which purports to give her £3000 with that portion which purports to put in a kind of settlement what the testator calls "the residue of" his property. He deals, in language that, to my mind, admits of no doubt, with all the shares which, in fact, were hers, as well as with the property, not shares, which was his own; and she is to get £3000, and no more, out of his property so defined, be it cash or shares. By so limiting the amount of this legacy, which she is to get absolutely, there is created a residue in which she is to get a life estate only. It was not seriously contended that if the words "including shares standing in her name jointly with mine" were to be found again in the clause dealing with the residue there would be much doubt in the case. My difficulty is to *avoid* taking the two clauses together, and, read together, they appear to me to bear the clear meaning I have put on them. Accordingly, for the plaintiff to claim to keep the shares which,

Appeal.
1916.
SULLIVAN
v.
SULLIVAN.
Sir Ignatius J. O'Brien L.C.

as we now know, were all hers, and to take all the cash and property which were his, appears to me to be a clear attempt to approbate and reprobate at the same time. I think, accordingly, that it is a clear case in which the widow is put to her election, and I think the judgment of Mr. Justice Barton was right.

RONAN L.J.:—

"Evidence of the circumstances surrounding the testator at the date of the will, the state of his family, and his property, is admissible in aid of construction. But evidence to show what were the *actual testamentary intentions* of the testator (as the instructions for a will . . .) is admissible only" for purposes not applicable in this case: Hawkins, p. 14, 2nd edition.

At the date of the will in this case, apart from the two sets of shares standing jointly in his name and that of his wife, the testator's property amounted to about £2000, consisting mainly of shares standing in his own name. At the date of his death this was reduced to in or about £1200 or £1300, mainly owing to reduction in value of these shares.

As to the shares valued at £1748 there was a presumption of law that the testator put them in the joint names with the intention that the wife should take them if she survived him. As to those valued at £4891 the presumption was that he put them in the joint names upon trust for himself. The Act 7 Edw. 7, c. 47, does not affect this presumption: sect. 52 of the Act and *Re Whitfield* (1). In the present case it was affirmatively decided that the deceased had transferred these shares into the joint names with the actual intention that they should be her property if she survived him.

By the judgment in the case both sets of shares were declared to be the property of the wife.

The general principle applicable to election is thus stated by Lord Hatherley in *Cooper* v. *Cooper* (2): "There is an obligation on him who takes a benefit under a will or other instrument to give full effect to that instrument under which he takes a benefit; and if it be found that that instrument purports to deal with something which it was beyond the power of the donor or settlor

(1) [1911] 1 Ch. 310.

(2) L. R. 7 H. & L. 53, at p. 70.

to dispose of, but to which effect can be given by the concurrence of him who receives a benefit under the same instrument, the law will impose on him who takes the benefit the obligation of carrying the instrument into full and complete force and effect." That is, of course, if he asserts his right to take the benefit under the instrument. It is for him to elect whether he will take it or not.

In the same case, at p. 67, Lord Cairns says: "The rule does not proceed either upon an expressed intention or upon a conjecture of a presumed intention, but it proceeds on a rule of equity, founded upon the highest principles of equity, and as to which the Court does not occupy itself in finding out whether the rule was present or was not present to the mind of the party making the will."

At pp. 70, 71 Lord Hatherley says: "The law inquires, on the death of the testator, when the will comes into operation, what is his intention, as expressed in the whole will, with reference to the disposition of that which he considers to be his property; and it being found clearly and distinctly (for it must be clearly and distinctly found) that he has expressed his intention of disposing of what belongs to another—when once that is ascertained completely, there is nothing else which the law implies with regard to his intention, beyond the ordinary intent implied in every man who affects by a legal instrument to dispose of property, that he intends all that he has expressed, and, among other things, that he intends to dispose of property as to which he has so expressed an intention, though it really does not belong to him."

Lord Hatherley, of course, does not mean to exclude from consideration the matters referred to in the rule I have cited from Hawkins.

Lord Parker (then Parker J.) says in *Re Harris* (1): "To raise a case of election under a will it must be, I think, reasonably clear from the will itself, having regard only to the circumstances under which it was made, and excluding evidence of intention, that the testator intended to dispose of property which in fact was not his own. Whether or not he knew it was not his own is, it seems to me, immaterial."

(1) [1909] 2 Ch. 206, at p. 209.

Appeal. 1916. SULLIVAN v. SULLIVAN. Ronan L.J.

In the present case the testator, neither at the date of his will nor at any time afterwards, had any shares of *his own* standing in the names of himself and his wife.

It follows, therefore, that when he mentions "shares standing in her name jointly with mine," he must have meant either (*a*) these shares, or (*b*) shares which might afterwards be placed in their joint names upon trust for himself.

The strongest way the case can be put for the appellant is this:—Assume that after the date of the will the testator had done this, and that at the date of his death he had shares of his own in the joint names, then it is argued these shares alone would answer the entire description—"my shares standing in the joint names," and there would be no election; that the fact that this did not happen cannot affect the construction of the will.

This is, I think, a fallacy; in construing the will, we are bound to have regard to the state of the testator's property at the *date of the will.*

Having regard to the facts I have stated, I really have no doubt, reading the will by the light of these facts, as to the state of the testator's property and the position of these shares, that there is a clear and distinct expression of intention to treat these shares as part of his property, and to dispose of them as such under his will.

No case has been cited to us which goes quite to the point. But this is really a specific, not a general, description, as in *Dummer* v. *Pitcher* (1), where the words were "all my funded property or estate."

On the other hand, in *Coates* v. *Stevens* (2), and *Grosvenor* v. *Durstin* (3), there were words confining the bequests to the state of things at the date of the will, though the descriptions were very general. In the latter case the words used were "my present funded stock."

It seems to me that the fallacy in the argument for the appellant lies in this. It assumes that no matter how specific the description may be, if it *is possible* for the testator, after the date of the will, to acquire property which will answer the description, there can be no claim of election.

(1) 2 M. & K. 262. (2) 1 Y. & C. Ex. 66. (3) 25 B. 97.

For instance, if a testator gave to his son "my house in Merrion Square," and he was then living in a house in that square, the property of his wife, and had no other house there, could it be contended that because it was *possible* that he might afterwards purchase another house in the square, the wife would not be put to her election if she claimed benefits under the will? The question really is, as put in substance by Lord Parker in *Harris's Case* (1), Is it reasonably clear that the testator intended to dispose of property not his own, or is it fairly open to the view that he meant property which he might afterwards acquire which would answer the description? He considered the case of the gold plate (see p. 212 of Report) "perhaps a more difficult one than the other." Comparing the description of the property in that instance with that in the present case, I think he certainly would have held the description in the present case sufficient to raise a case of election.

In my opinion, the notion that this testator in this will when speaking of the "shares in the joint names," ever thought of shares to be thereafter put in the joint names, is fanciful and extravagant, and ought not to be entertained by the Court.

I form this opinion on the will itself read in connexion with the facts already referred to. If this is so, it follows that he meant these shares by the will.

If so, there can be no doubt that he intended to dispose of them by his will in precisely the same way as his own shares standing in his own name.

I agree that the Appeal ought to be dismissed.

MOLONY L.J.:—

The testator bequeathed to his widow, the plaintiff, the sum of £3000 for her absolute use, "same to be paid to her either in cash, or in such of my shares (including shares standing in her name jointly with mine) as she may select." After providing some small legacies, he directed the executors to hold the residue of his property, both real and personal, upon trust to pay the income thereof to his wife during her life, and after her death for the children of his brother, John, and upon an educational trust. The plaintiff is a sister of the first wife of the deceased, and at the date of the Deceased Wife's Sister's Marriage Act,

(1) [1909] 2 Ch. 209.

Appeal. 1907, he had invested in the joint names £4891, and, subsequently,
1916. he invested in the joint names £1748. He had these invest-
SULLIVAN ments at the date of the will, and no change took place in his
v. lifetime. Apart from these his personal property was sworn
SULLIVAN. at £1858, and he had no real estate. The shares in the joint
Molony L.J. names are admittedly the sole property of the plaintiff, and the question is whether she is put to her election to take under the will or against it. There is no difficulty about the law. As Lord Parker (then Parker J.) said in *Leacroft* v. *Harris* (1): "To raise a case of election under a will, it must, I think, be reasonably clear from the will itself, having regard only to the circumstances under which it was made, and excluding evidence of intention, that the testator intended to dispose of property which in fact was not his own. Whether or not he knew it was not his own is, it seems to me, immaterial." The testator meant his wife to get £3000, but he realized it would be difficult for her to get it without having recourse to the shares standing in the joint names, and he, accordingly, gave her the right to be paid either in cash or in shares (including shares standing in the joint names). Did he show an intention to dispose of all the shares by his will, whether standing in the joint names or not? I think he was clearly referring to the shares which then were in fact standing in the joint names, rather than to shares which he might afterwards acquire and put into the joint names. If "the shares" are not required to meet the legacy of £3000, and so far as not required, they would clearly pass under the residuary gift, and although the residuary gift standing by itself would not be sufficient to raise a question of election, yet, taken in conjunction with the terms of the gift of £3000, it seems to me impossible to resist the conclusion that the testator was dealing with property not his own, and sufficiently identified as being his wife's, and that, consequently, she is put to her election.

Solicitor for the plaintiff: *Daniel Purcell.*

Solicitor for the defendant: *James Riordan.*

Solicitors for the Commissioners of Charitable Donations and Bequests: *Maxwell & Meldon.*

R. ST. J. C.

(1) [1909] 2 Ch. 206, 209.

IN RE JEREMIAH BUCKLEY (1).
(FOLIO 10115, CO. CORK.)

Madden J.
1916.
Nov. 13.

Land Registry — Rectification of Map — Practice — Sect. 34 of the Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66) — Order VI, rule 1.

A dispute arose between the registered owner of land registered under the Local Registration of Title (Ireland) Act, 1891, and the owner of turbary rights thereon as to the plot over which the latter was entitled to exercise such rights, the latter contending that the map was incorrect in this respect, the former contending that there was no mistake.

Held, that the case did not come within s. 34, sub-s. 2, of the Act, or Order VI, Rule 1, (1) (*a*) (ii) of the rules made thereunder, and that accordingly an application to the Court to refer the question to the County Court was misconceived.

Any proceeding taken under s. 34, sub-s. 1, of the Act on the ground of fraud or mistake should be by an independent proceeding in a court of competent jurisdiction—in the present case, the equity side of the county court.

MOTION ON NOTICE.

Jeremiah Kelly, the owner of turbary rights upon the lands of the registered owner, applied for an order referring the question of the amendment of the map attached to the folio to the county court judge of the West Riding of the County of Cork for his decision upon the facts, on the ground that it was desirable that oral evidence should be taken.

The facts, so far as material, were that Jeremiah Kelly, the applicant, was a tenant purchaser on the same estate as Buckley, the registered owner; and under the purchase agreements of both holdings and the vesting orders as made by the Land Commission and registered, Kelly had a right to turbary on a plot marked No. 5 and coloured brown upon the map of Buckley's holding, lodged with the Land Commission and upon the Land Registry map. It was alleged in affidavits filed on behalf of Kelly that the plot No. 5, coloured brown, was not the plot where he had, in fact, the right to cut turf, and that the maps should have shown this

(1) Before MADDEN J.

Madden J. 1916.

In re Buckley.

plot upon another and different portion of Buckley's holding. This was denied by Buckley, who swore there was no mistake whatever. The valuations of both Kelly's and Buckley's holdings were within the county court jurisdiction.

Moriarty, for the applicant, Kelly :—

The affidavits show that there was a mistake in reference to the applicant's turbary plot. The plot should have been marked in another place where Kelly's bank was really situate. The valuation of Buckley's holding is only £19 10*s.*; and the whole matter is eminently one for the county court judge, and should be referred to him.

H. D. Conner K.C., with him *H. J. Moloney*, for Buckley :—

This is not a case under sect. 34, sub-s. 2, and the application is misconceived. There is no jurisdiction to refer to the county court judge, under Order VI, Rule 1, of the rules of 1910, any question of fraud or mistake, which should be determined by a competent Court under the provisions of sect. 34, sub-s. 1. It is necessary to keep the distinctions between the two jurisdictions clearly in mind, because under the ordinary equity jurisdiction there are different rights of appeal from those to which the parties would be entitled under an order of reference. He submitted the application was erroneous, and should be dismissed.

[His Lordship said he would not bind Mr. Moriarty by the form of the application. He would treat it as an application to rectify.]

Then the applicant will have to take independent proceedings in such manner as he may be advised.

Madden J.:—

Mr. Moriarty wants an opportunity to be given to his client to have the map amended on the ground of common mistake, and he wants the proceedings for this purpose to be taken before the county court judge.

This can be done, but not in the form proposed by the notice of motion. To have the register modified on the ground of common mistake, an independent proceeding must be taken in a Court of competent jurisdiction, which, in the present case, is the

county court. I will give Mr. Moriarty's client an opportunity of instituting such a proceeding. The case does not come under Order VI, Rule 1, which empowers the judge to refer a question to the county court for decision on the ground that it is desirable that oral evidence should be taken. That rule applies to questions arising in the exercise of the jurisdiction vested in the Court or registrar under the Local Registration of Title Act. The proceeding to be taken under sect. 34, sub-s. 1, is an independent proceeding at the equity side of the county court jurisdiction, and not as a matter referred to it by this Court.

Madden J.
1916.
In re BUCKLEY.

I will allow the present motion to stand over, pending the taking of such proceedings as Mr. Moriarty's client may be advised to take, treating it as an application to have the map rectified.

Solicitor for the applicant: *T. P. Grainger.*
Solicitor for J. Buckley: *C. W. Ashe.*

T. C. T.

MUNSTER AND LEINSTER BANK *v.* MACKEY.

M. R.
1916.
Nov. 21.

Practice—Mortgage Suit—Plaintiffs paid the Amount of their Demand—Death of Defendant—Application by Puisne Incumbrancer to have Proceedings continued—Application made ex parte*—Order XVII, Rules* 2, 4; *Order XXXIII, Rules* 7, 8.

In a mortgage suit an order for the sale of certain lands of the mortgagor was made, and out of the proceeds the plaintiffs were paid in full. The defendant having died, a puisne incumbrancer, who had not been paid in full, applied *ex parte* to have the proceedings continued by the original plaintiffs against the personal representative of the defendant.

Held, that the proper application was for an order to continue proceedings in the name of the applicant as plaintiff, against the personal representative of the defendant, and that the application should be by summons.

MOTION OF COURSE.

Application on behalf of Patrick Rogers to have the proceedings continued by the plaintiffs against Mary Mackey, executrix of the defendant. The action was brought to recover the amount of a mortgage. Certain lands of the defendant were sold in the

M. R. 1916.

MUNSTER & LEINSTER BANK v. MACKEY.

action, and out of the proceeds the plaintiffs had been paid off, and Patrick Rogers, a puisne incumbrancer, had been paid the balance available on foot of his demand which remained unsatisfied.

Murnaghan, for Patrick Rogers, referred to Order XVII, Rules 2, 4, Order XXXIII, Rules 7, 8. By an order made in the action on the 17th July, 1916, reciting that the plaintiffs had been paid off, the carriage of the proceedings was transferred to the defendant. If he were now alive, I could take out a summons asking to have carriage transferred to me. Order XXXIII, Rule 8, deals with the case of a puisne incumbrancer who has not been paid off, and he is the person to apply under that rule. Order XVII, Rule 4, states that applications to continue proceedings shall be made *ex parte*, and there is nothing in it, or in Order XVII, Rule 2, to show that the application must be made by a party to the proceedings.

O'CONNOR M.R.:—

This is not the ordinary case of an application to continue proceedings by or against the personal representative of a deceased party. It is an application by a person not a party, but having an interest in a suit as a puisne incumbrancer, who has not been paid off, that the suit be continued by the original plaintiff, the first incumbrancer who has been paid in full, and who has no longer an interest in the suit, against the personal representative of the defendant, a mortgagor who has died. The plaintiff having been satisfied, does not wish to continue the proceedings. I think that the defendant's proper course is to take out a summons that the suit be continued in the name of himself as plaintiff against the personal representative of the defendant. The present plaintiffs, on being served, may assent; but I cannot behind their back make any order affecting them.

Solicitor for Patrick Rogers: *William Kelly.*

A. H. W.

IN THE MATTER OF AN INDENTURE DATED THE 8TH APRIL, 1914, MADE BETWEEN KELLY AND KELLY, AND IN THE MATTER OF THE LAW AND PROCEDURE (EMERGENCY PROVISIONS) (IRELAND) ACT, 1916, SECT. 1, SUB-S. 4.

M. R.
1916.
Nov. 27.

KELLY *v.* KELLY.

Suit to perpetuate Testimony—Law and Procedure (Emergency Provisions) (Ireland) Act, 1916 (6 & 7 *Geo. 5, c.* 46), *sect.* 1, *sub-s.* 4.

Where an application was made under the Law and Procedure (Emergency Provisions) (Ireland) Act, 1916, sect. 1, sub-sect. 4, to perpetuate the testimony afforded by a deed which had been destroyed in the rebellion:

Held, that the Act does not affect the general principles governing suits to perpetuate testimony, except by making such a suit maintainable in a case involving present rights; that the granting of an order perpetuating testimony is in the discretion of the Court, and that such an order will not be made in a case in which, in the opinion of the Court, it is not necessary.

The principles of law relating to suits to perpetuate testimony stated.

SUMMONS.

By an indenture, dated the 14th April, 1914, and made between Jane Kelly of the first part, Mary Jane Kelly, Catherine Kelly and Margaret Long of the second part, and the said Mary Jane Kelly, Catherine Kelly, and Margaret Long (thereinafter called the trustees) of the third part, reciting (*inter alia*) the death of a certain Robert Kelly intestate, leaving his widow, the said Jane Kelly, and his daughters, the said Mary Jane Kelly, Catherine Kelly, and Margaret Long, his sole next-of-kin him surviving, and the grant of letters of administration to the said Jane Kelly, certain household furniture and chattels, stocks, funds, securities, live stock and property were assigned to the trustees upon trust for the said Jane Kelly during her life, and after her death, as regards the household furniture and chattels, upon trust for the said Mary Jane Kelly, and as regards the residue upon trust for sale and division of the proceeds between the said Mary Jane Kelly, Catherine Kelly, and Margaret Long in a certain manner, and it was declared that all *profits*

M. R. 1916.

KELLY v. KELLY.

à prendre, meadowing, or grazing rights formerly enjoyed or exercised by the said Robert Kelly in and over the lands of Broadmeadows, in the County of Dublin, should thenceforward be enjoyed and exercised by the said Jane Kelly during her life, and after her death should be vested in the said Catherine Kelly, her executors, administrators, or assigns, in as full a manner as the same were formerly vested in the said Robert Kelly.

The deed having been duly executed by all the parties, was deposited with the solicitor for the plaintiffs for safe custody, and was destroyed on the 27th April, 1916, when his offices were burned in the course of the rebellion.

Mary Jane Kelly, Catherine Kelly, and Margaret Long took out the present summons under sect. 1, sub-s. 4, of the Law and Procedure (Emergency Provisions) (Ireland) Act, 1916, for an order that the testimony afforded by the said deed might be perpetuated, and that for that purpose it might be declared, (*a*) that the said document was lost, destroyed, or damaged in the course of the recent disturbances in Ireland, (*b*) that the copy of the said document exhibited in the affidavit grounding the summons was a true copy, and (*c*) that the said true copy might be filed.

J. Creed Meredith, for the plaintiffs :—

The lost deed is an essential muniment of title in respect of the lands of Broadmeadows; the rights of grazing and meadowing dealt with by it are valuable, a rent of £5 10*s*. being paid for them, and by an indenture of the 14th October, 1916, the lands have been assigned to Jane Kelly for life, with remainder to Catherine Kelly, subject to the said rights, so that the deed of the 9th April, 1914, would be essential in the event of Jane Kelly and Catherine Kelly desiring to dispose of the lands. The object of the sub-section is to perpetuate "the testimony afforded by a document," which can only be done by making a declaration as to its contents.

Serjeant Matheson K.C., for Jane Kelly :—

The Act was not intended merely to extend the jurisdiction in suits to perpetuate testimony to cases of present rights. It was intended to provide an authoritative substitute for the testimony which the document itself would give if in existence.

O'CONNOR M.R.:—

M. R.
1916.

KELLY
v.
KELLY.

As the present is the first of what is likely to be a series of actions or summonses to perpetuate testimony, it seems convenient to review shortly the law as it existed prior to the late Emergency Act, which was passed in consequence of the destruction of legal documents during the recent disturbances.

A suit to perpetuate testimony was only maintainable when the plaintiff, having an interest in property, could not at the time institute a suit for its recovery by reason of his interest being one in remainder, or being dependent on a contingency which had not yet happened. In such circumstances the matter could not be made the subject of present judicial investigation, and whenever there was a danger of material evidence in support of the plaintiff's title being lost before the action could be brought to a hearing, a suit could have been instituted for the sole purpose of perpetuating the testimony which the plaintiff was then in a position to give. This testimony, which was placed on record, could afterwards be given on the hearing of the action for the trial of the right to property if it had in the meantime become unavailable.

An example of this is the case of a remainderman, whose title to the remainder, when it would fall into possession, would depend upon some matter of pedigree. There might be during the continuance of the prior estate old persons living who would be able to prove the material facts, but they might have died before the remainderman's title fell into possession.

There was, so far as I know, only one exception to the rule that a suit to perpetuate testimony was only maintainable when the plaintiff had a present title. That was the case of a person who, being in actual possession of his property, could not institute an action for its recovery, but was apprehensive of an ejectment or some other form of action being brought against him at a future time when, owing to the death of a material witness, he would not be able to maintain his title.

In such case it would have been allowable for him to institute a suit to perpetuate testimony.

The necessity for such a suit arose entirely from the

M. R. 1916.

KELLY v. KELLY.

impossibility which formerly existed of trying future rights, and I am inclined to the opinion that the procedure of perpetuating testimony will, in the future, except in special circumstances, be found to be unnecessary and inappropriate. This is suggested by Stirling L. J. in *West* v. *Sackville* (1). In his judgment in that case, which was a suit to perpetuate testimony concerning the validity of the marriage of the plaintiff's mother, the Lord Justice referred to the powers under the Judicature Act to give judgments which merely declare rights, and, without deciding the point, intimated that, as such a remedy was open, the plaintiff might not be entitled to the relief which he asked for—that is, the perpetuation of testimony. The relief, however, was refused on other grounds.

It seems further advisable to call attention to the rule that a suit to perpetuate testimony ought not to be brought to a hearing. The practice is simply to take the evidence, and then to make an order that the evidence taken shall remain to perpetuate the memory thereof, and to be used in the case of the death of the witnesses or their inability to give evidence when the occasion arises.

It is well, too, not to lose sight of the fact that the evidence can only be available against persons who are parties to the suit, or who claim through them by privity of estate.

Such being the law when the Emergency Act was passed, it remains to see what is its effect. I do not think that the Act touches the general principles which governed suits to perpetuate testimony except in one material matter. It has made such a suit maintainable in a case in which present rights are involved; that is, it is not necessary that the property which is the subject-matter of the suit should be in remainder, or for any reason recoverable only *in futuro*. Subject to this the law is the same as it was. The general principles are the same, and, as I understand them, it was always in the discretion of the Court to make an order for the perpetuation of testimony, and the absence of necessity for the order would be a valid reason for refusing it.

To come now to the case before me. The parties—plaintiffs and defendant—are interested in the assets of a deceased. They entered into a deed of family arrangement under which the assets

(1) [1903] 2 Ch. 378.

are to be administered on certain lines. That deed was destroyed during the recent disturbances. A copy is in existence which all parties admit to be a true copy. In these circumstances a summons (as allowed by the Rules of Court, framed under the Act) has been taken out to perpetuate the testimony of the deed. I see no necessity for the proceeding. All parties admit that the copy is a true copy. That was never disputed. An admission is the highest form of evidence. The parties had only to sign an admission in the fold of the copy that it is a true copy of the original deed which was destroyed, and that the deed was executed as the copy purports to show. This is a simple and inexpensive way of making the copy the best evidence of the original deed, and with that way available as it is, and always was, I fail to see why the present proceeding was taken.

Solicitors for the plaintiffs: *Rooney & Co.*
Solicitor for the defendant: *Meldon & Co.*

A. H. W.

H. L.
1916.
Nov. 13.

O'CONNOR *v.* TANNER (1).

Settlement—Construction—Charge on Real Estate settled—Income for the person for time being entitled to the Real Estate, during certain lives—Corpus, on death of surviving life, for the person then entitled to the Inheritance, and to merge—Trust in event of Sale of Real Estate for Payment of Incumbrances—Voluntary Sale while one of the lives in being—Resulting Trust.

APPEAL by Michael James O'Connor, personal representative of James Jocelyn Boyd, from the order of the Court of Appeal in *In re Boyd's Trusts*; *Devereux* v. *Calm* ([1916] 1 I. R., 121).

The Solicitor-General for Ireland (*James O'Connor K.C.*); *Samuel L. Brown K.C.* (with them *St. L. E. J. Devitt*) (of the Irish Bar), for the appellant. *W. M. Jellett K.C.*, and *J. E. Walsh* (of the Irish Bar), for the respondents.

The House of Lords (Viscount Haldane, and Lords Parmoor and Atkinson) affirmed the judgment of the Court of Appeal with costs.

The respondents were not called on.

Solicitor for the appellant: *Gavin Duffy*, for *M. J. O'Connor & Co.*

Solicitors for the respondents: *Waddilove & Johnson*, for *Little & Elgee.*

(1) W. N., 1916, p. 372.

SHANAHAN *v.* SHANAHAN.

Barton J.
1916.
Dec. 5, 19.

Practice—Perpetuation of Testimony—Lost Deed—Destruction during Civil Commotion—Law and Procedure (Emergency Provisions) (Ireland) Act, 1916 (6 & 7 Geo. 5, c. 46), sect. 1, sub-s. 4—General Jurisdiction of Court.

During the rebellion in Ireland in April, 1916, the offices of certain solicitors in the city of Dublin were destroyed, and certain title-deeds and documents, of which the solicitors were custodians, perished.

Held, that the Court had jurisdiction on an originating summons to order that the evidence of witnesses be taken, and be preserved by being filed in the Record and Writ office.

Held, also, that the evidence should, inter alia, be directed to the following points:—1, The existence of the deed before the rebellion which caused its destruction; 2, the fact of its destruction; 3, its due execution; and 4, its contents.

Held, also, that the Court had under its general jurisdiction power to make a declaratory order, in a proper case, that a copy of a lost deed was a true copy.

By indenture dated 16th June, 1915, and made between Nicholas Power of the first part, James Shanahan, Roger Shanahan, Rev. John Shanahan, Margaret Phelan, Ellen Hogan, Bridget Shanahan of the second part, and William Shanahan of the third part, it was recited that by indenture of conveyance of 10th July, 1855, the Incumbered Estates Court, in consideration of £800, granted unto Nicholas Power (senior) and his heirs, one undivided moiety of certain lands therein described, subject with the other moiety thereof to a certain rent; that the said Nicholas Power died on 23rd June, 1869, having previously made a will and two codicils, whereby he devised and bequeathed to James Shanahan and his heirs the sum of £44 yearly chargeable upon and payable out of the said lands, and devised and bequeathed to Thomas Power the residue of his property, which residue included his interest in the said lands; that the said Thomas Power died on the 22nd October, 1897, leaving a will whereby he devised the residue of his property (which residue

Barton J. 1916.

SHANAHAN v. SHANAHAN.

included the said lands) to Nicholas Power, party of first part to the said indenture of 16th June, 1915; that the said James Shanahan died 24th March, 1883, leaving a will whereby he devised and bequeathed all his property to his brother, Rev. John Shanahan (senior) and his wife Ellen Shanahan in trust for his said wife and his eight children, namely, the parties to the said indenture of the second and third parts respectively, and one Thomas Shanahan; that the said Thomas Shanahan died on 16th May, 1907, intestate, leaving the said James Shanahan, one of the parties thereto of the second part, his heir-at-law; that the said Ellen Shanahan died the 24th October, 1913, leaving a will whereby she devised and bequeathed her interest in the said lands to said Margaret Phelan; that the rents and profits of the said undivided moiety of said lands had not been sufficient to discharge said annuity of £44, and that the said James Shanahan (senior) and his successors in title had been in possession and receipt of the entire of the rents and profits thereof since the death of the said Nicholas Power (senior); that the parties thereto of the second part had been paid in full their shares of the real and personal property of their father, the said James Shanahan (senior), and they had agreed to convey their interests in the said lands to said William Shanahan, who had not been paid anything in respect of his share of the said assets; and that the said Nicholas Power had agreed to join in such conveyance for the purpose of vesting in the said William Shanahan the said undivided moiety of the said lands in fee-simple, and it was witnessed that the said Nicholas Power granted unto the said William Shanahan and his heirs the said undivided moiety of the said lands. And it was further witnessed that the said parties thereto of the second part, according to their respective interests in the said annuity of £44 granted the same unto the said William Shanahan and his heirs.

The indenture of conveyance of 10th July, 1855, and of 16th June, 1915, were in the custody of the solicitors for the said William Shanahan when they were destroyed by fire in their office during the disturbances which took place in Dublin in April, 1916.

William Shanahan brought proceedings by originating summons under the Law and Procedure (Emergency Provisions) (Ireland) Act, 1916, in which the said Rev. John Shanahan was

defendant, claiming that the testimony afforded by the said indentures of the 10th July 1855, and 16th June, 1915, be perpetuated, and that for that purpose the Court should make the following declarations, namely, a declaration that the said documents had been lost or destroyed in the recent disturbances, and that the copies exhibited in the affidavits were correct copies, and that the said copies be filed in the proper office.

In the affidavits, grounding the summons, the solicitors for the plaintiff exhibited a copy of the memorial of the conveyance of 10th July, 1855; and a copy of the conveyance of 16th June, 1915, which copy had been made from a copy which had been lodged with the Inland Revenue Authorities for the purpose of assessing stamp duties. Evidence was given that it was a correct copy by the person who copied and compared it.

J. C. Meredith, for the plaintiff, in support of the application:—

The meaning of sect. 1, sub-s. 4, of the Law and Procedure (Emergency Provisions) (Ireland) Act, 1916 (6 & 7 Geo. 5, c. 46), should be interpreted in the light of the controlling words, "subject to rules made under this Act." Consequently, mere rules of procedure, applicable to the old suits for perpetuation of testimony, should not be resorted to for the purpose of showing how the powers and jurisdiction of the High Court with respect to the perpetuation of testimony are to be extended to the cases contemplated by the present Act. The Court has powers and jurisdiction beyond those exercised in the special suits to perpetuate testimony. The sub-section contemplates a declaration as to the contents of the lost documents. The testimony afforded by the documents lost is afforded by their contents. The mere filing of evidence, apart from any declaration, is a perpetuation, not of the testimony afforded by the lost documents, but of testimony as to that testimony.

Serjeant Matheson K.C., for the defendant, supported the application, and submitted that the words of sub-sect. 4 were wide enough to give the Court jurisdiction to make a declaratory order. He cited *Litton* v. *Murphy* (1).

(1) 1 L. R. Ir. 301.

Barton, J.
1916.

SHANAHAN
v.
SHANAHAN.

Dec. 5.

BARTON J. :—

This application raises several interesting questions. One of the incidents of the recent rebellion was the destruction of solicitors' offices, and with them of title-deeds and documents, of which solicitors were custodians. The Legislature stepped in to help the injured parties, by applying to the emergency the old equitable jurisdiction for the perpetuation of testimony. It is unnecessary for me refer to the history of that jurisdiction, because the Master of the Rolls has done so recently in the case of *Kelly* v. *Kelly* (1).

As the result of a search in the Public Record Office, I have found a case which illustrates the way in which this jurisdiction was worked about fifty years ago. It was a case of *Talbot, Petitioner*; *Kennedy and Others, Respondents*, which came before Lord Chancellor Brady by way of a cause petition in December, 1861. It appears from his petition that the petitioner, George Talbot, claimed to be entitled to certain lands as reversioner and remainderman under a deed of settlement, dated 10th September, 1841, and alleged that another person named William Talbot falsely claimed to be entitled to the same lands in fee-simple, and that the petitioner's title-deed had been lost or destroyed. The order of the Lord Chancellor, after referring to the debate of the matter by counsel and to the affidavits filed on behalf of the petitioner and the respondents respectively, proceeded as follows :— "His Lordship doth order that a Commission do forthwith issue in the matter to examine in perpetuam rei memoriam" certain named witnesses, "with respect to the execution and contents of the deed of the 16th September, 1841, in the said petition mentioned, so that the testimony of the said witnesses may be perpetuated and preserved in perpetuam rei memoriam." The witnesses in question, or one or some of them, were in London, and, by consent, the examination was ordered to be taken viva voce in presence of counsel. There was a reference to Chambers to appoint a Commissioner; and it was ordered that on the return of such Commissioner the Court should make such further order as might be just. Liberty to apply was also given.

Subsequent motions were made in the matter on the 30th June and 8th November, 1862, and on the 14th February and 7th May,

(1) Since reported *ante*, p. 51.

1863, in reference to costs, and in reference to a complaint of delay as regards the examination of one of the witnesses. The depositions were sealed up, and remain in the Public Record Office in a parcel, with the seals still unbroken after fifty years. Serjeant Matheson has also called attention to *Litton* v. *Murphy* (1), where the Vice-Chancellor in 1878 ordered testimony to be perpetuated upon a question of water rights. The order directed witnesses to be examined before the Examiner of the Court, with liberty to cross-examine; and that the evidence when taken should be enrolled in the Record and Writ Office for the perpetuation of the same.

It appears from these cases that there will be no difficulty in making an order under the new Emergency Act to have the evidence of witnesses taken and preserved by being filed in the Record and Writ Office. The evidence may be directed, inter alia, to the following points:—1, the existence of the deed before the recent disturbances; 2, its destruction; 3, its due execution; and 4, its contents. The evidence can be taken either by affidavit or viva voce. When taken viva voce, it may be taken either by the Court or by an officer of the Court, or by a Commissioner appointed for the purpose. There need be no sealing up of the depositions. Copies of them will be obtainable not only for use in Court at a trial in the events contemplated by the Rules, but also as evidence for the purpose of making title to a purchaser or a mortgagee, for which purpose they will afford more satisfactory evidence of the loss and contents of the documents than a mere statutory declaration.

The summons also seeks a declaration that two deeds were lost in the recent disturbances, and that the copies exhibited in the affidavit are true copies of those deeds. In one case, the document, which the Court is asked to declare a true copy of the deed, is the Memorial in the Registry of Deeds Office. As the memorial in question does not purport to be a copy, but is no more than an abridgment of certain parts of the deed, I need not further discuss that part of the application. In the case of the other deed there is a copy which was sent to the Revenue authorities for the purpose of duty assessment. It is, therefore, a copy which has been acted

(1) 1 L. R. Ir. 301.

Barton J. 1916.

SHANAHAN v SHANAHAN.

upon; and sufficient evidence has been given that it is a correct copy.

The procedure for the perpetuation of testimony should not be confounded with the ordinary jurisdiction of the Court to ascertain and declare the contents of instruments which have been lost or destroyed by accident, by proof of a duly authenticated copy or draft, or by other sufficient secondary evidence. That jurisdiction is referred to in Story's Equity Jurisprudence, in paragraph 81 *et seq.*; and a form of declaratory decree is to be found in Seton, 7th edition, vol. iii, chap. li, p. 2226. I see no reason why, in a proper case, a declaration to that effect should not be made in a proceeding of this kind, in addition to the special relief contemplated by the recent Emergency Act.

In the present case all the parties to the deed have been made parties to the summons, and, having been advised as to their position, have consented to an order declaring the copy of the conveyance of the 16th June, 1915, to be a true copy of that deed. The parties were numerous, and were scattered in different parts of the country, and I think that the proceeding, differing in that respect from *Kelly* v. *Kelly* (1), was properly brought, and that their consent could not have been obtained without recourse being had to the machinery of the Court, and without legal proof being given to their satisfaction, and to that of their advisers, of the destruction and contents of the deed.

Solicitors for the plaintiff: *Rooney & Co.*
Solicitors for the defendant: *Meldon & Co.*

R. W. L.

(1) Since reported *ante*, p. 51.

IN RE CUSIN, DECEASED.
WALKER *v.* CUSIN.

Barton J.
1916.
Oct. 30.
Nov. 15.

Will—Construction—Gift of Personal Estate to A "or his heirs"—Substitution.

A testator bequeathed to his wife the income of all his property during her lifetime, and directed everything to be sold at her death, and the proceeds to be equally divided, one-half among his wife's and one-half among his own relations, viz., "to S. or her heirs, to L. or her heirs, to H. or her heirs, to F. or her heirs, in four equal shares . . .; to J. or his heirs, to C. or her heirs, and to J. or his heirs, in three equal shares." All these named relations survived the testator, but three of them died during the lifetime of the testator's wife, viz. S., who died intestate, leaving a husband and seven children, J., who left a widow and next-of-kin but no children, and C., who died a spinster and intestate.

Held, 1, that in all these gifts the word "heirs" meant such persons as would be entitled to succeed to personal property *ab intestato*; and 2, that upon S.'s death, her husband, being the person who on her death was entitled to her personal property *ab intestato*, took her share.

ORIGINATING SUMMONS.

The testator, Henry Cusin, late of 31 Surrey Street, Belfast, died on the 31st July, 1895. By his last will, dated the 25th December, 1894, the testator appointed the plaintiffs James Walker and Thomas Brown, executors of his will, and directed his debts, funeral, and testamentary expenses to be paid as soon as possible after his decease. He then proceeded to bequeath to his wife all his household belongings absolutely. The will proceeded: "I also bequeath to her during her lifetime the profits of all my house property, life insurance, ground rents, shares in any company, and all the rest of my money and property, after her death everything to be sold to the best advantage and the proceeds to be equally divided, one-half to be paid over to her relations and one-half to be paid over to my relations in the following order:—To Sarah, daughter of my wife's brother James or her heirs, to Lizzie, daughter of my wife's sister Matty or her heirs, to Helen, daughter of my wife's sister Fanny or her heirs,

Barton J. 1916. WALKER v. CUSIN.

to Frances, daughter of my wife's sister Harriet or her heirs, in four equal shares after the expenses connected with the sales. The other half to be divided as follows:—To my brother John or his heirs, to my sister Christian or her heirs, and to my brother James or his heirs in three equal shares as soon as possible after the death of my wife."

The testator's property at his death consisted of stocks and shares and house property. The testator's widow, during her lifetime, received the income of the testator's property, and died on the 31st January, 1916.

All the relations of the testator's wife and all the relations of the testator mentioned in his will survived the testator; but, of the seven so mentioned, three died during the lifetime of the widow, viz., Sarah Cusin, who died intestate, leaving a husband and seven children her surviving; John Cusin, leaving a widow, Margaret Cusin, and several next-of-kin, but no children; and Christian, who died a spinster and intestate.

The executors brought the present summons for the determination of the question (among other questions arising on the will) in the events that happened, who was now entitled to the shares in the residue bequeathed in the will?

Megaw, for the executors:—

M. G. Ellison, for the widow of John Cusin, deceased:—

The property vested in John Cusin at the death of the testator: Jarman (6th ed.), p. 1404; the gifts to "heirs" are to the "heirs" of original legatees who predeceased the testator. If the gifts did not vest at the death of the testator, the statutory next-of-kin, including the widow, are now entitled: *Smith* v. *Palmer* (1); *Keay* v. *Boulton* (2); *In re Stannard*; *Stannard* v. *Burt* (3); *Doody* v. *Higgins* (4).

James M'Connell, for the next-of-kin of Sarah Cusin, deceased:—

The time of vesting was the date of the death of the widow of the testator. The property being personalty, and Sarah Cusin having died before the period of distribution, there is a substitu-

(1) 7 Hare 225.
(2) 25 Ch. D. 212.
(3) 52 L. J. Ch. 355.
(4) 9 Hare App. 32; 2 K. & J. 729.

tionary gift to her next-of-kin: *Milroy* v. *Milroy* (1); *In re Philps' Will* (2); *Finlason* v. *Tatlock* (3). A husband is not one of the next-of-kin, and there is no case deciding that a husband would take under such a gift as the present one.

W. Hume, for James Cusin (junior), heir-at-law of Sarah Cusin, deceased:—

There is here a contingent gift to Sarah Cusin, who takes nothing till the death of the tenant for life. Sarah Cusin being dead at the time of vesting, her heir-at-law takes as *persona designata*: *De Beauvoir* v. *De Beauvoir* (4); *In re Woolley* (5); *Lanphier* v. *Buck* (6); *Gwynne* v. *Muddock* (7); *Smith* v. *Butcher* (8). The husband is not, in any event, entitled, because "heirs" means those who take by way of succession. The husband would not take by succession, but *jure mariti*.

J. M. Whitaker, for James Cusin, husband of Sarah Cusin, deceased:—

If there was a vested estate at the testator's death, it was liable to be divested. If it did not vest at the testator's death, it vested at the death of the tenant for life. The substitution takes place at the death of the tenant for life: *Girdlestone* v. *Doe* (9); *Doody* v. *Higgins* (10). The decision *In re Stannard, Stannard* v. *Burt* (11) went on the assumption that the gift vested at the death of the testator, but was liable to be divested. Under a gift in a will to "next-of-kin," a husband could not take: *Garrick* v. *Lord Camden* (12). Where there is a gift "to the heirs" the law gives it to the person who would take, on the former owner dying intestate, and if the first taker dies, leaving a husband, the husband takes. "Giving to A, and on his death to his heirs . . . is only saying 'let those take it who may be entitled to take it'": per Lord Brougham C. in *Gittings* v. *M'Dermott* (13); *Keay* v. *Boulton* (14).

Cur. adv. vult.

(1) 14 Sim. 48.
(2) L. R. 7 Eq. 151.
(3) L. R. 9 Eq. 258.
(4) 3 H. L. C. 524.
(5) [1903] 2 Ch. 206.
(6) 2 Dr. & Sm. 484.
(7) 14 Ves. 488.
(8) 10 Ch. D. 113.
(9) 2 Sim. 225.
(10) 9 Hare App. 32; 2 K. & J. 729.
(11) 52 L. J. Ch. 355.
(12) 14 Ves. 372.
(13) 2 M. & K. 69, at p. 81.
(14) 25 Ch. D. 212.

Barton J.
1916.

WALKER
v.
CUSIN.

Nov. 15.

BARTON J. :—

The principal question for decision relates to the meaning of the word "heirs" in the three cases in which the beneficiaries mentioned in the will predeceased the widow of the testator. In my opinion the word "heirs" should not be construed to mean heirs-at-law, and I cannot accede to Mr. Hume's argument that, under this will, the heir-at-law of any one of the beneficiaries took as *persona designata*. I think the word "heirs" should be read as meaning such persons as would legally succeed to personal property *ab intestato*: *Mounsey* v. *Blamire* (1); *Gittings* v. *M'Dermott* (2); *Keay* v. *Boulton* (3). In the case of Sarah, who left a husband, he would be entitled on her death to her personal property under sect. 6 of the Irish Act for the better settling of Intestates' Estates (7 Wm. 3, c. 6), which, in this respect, corresponds to sect. 25 of the English Statute of Frauds. In the case of John, who left no children, but a widow and next-of-kin, his share passed moietively to his widow and to his next-of-kin; and in the case of Christian, her share passed to her next-of-kin—*i.e.*, to her brother James.

There was no serious dispute at the Bar except in the case of Sarah. In her case it was contended that under the word "heirs" her share would pass to her next-of-kin; and passages were cited from several cases in which "heirs" of personal property has been held to mean next-of-kin. But that is because the persons entitled to succeed to the personal property *ab intestato* were in those cases the next-of-kin. In the present case it is the husband who is so entitled. It is well settled that a widow, although not strictly a next-of-kin, takes her share in cases of this kind. Why should not a husband take, when he is the person who is entitled on his wife's death to her personal estate? I therefore hold that, in the events that have happened, S.'s husband is entitled to her share.

Solicitors for the executors: *Johns, Elliot, & Johns.*

Solicitor for the widow of John Cusin: *G. H. Quarry.*

Solicitors for the next-of-kin of Sarah Cusin: *Bennett Thompson & M'Neill.*

Solicitors for the heir-at-law of Sarah Cusin: *Vint & White.*

Solicitors for James Cusin: *C. & H. Jefferson.*

D. M. S.

(1) 4 Russ. 384. (2) 2 M. & K. 69. (3) 25 Ch. D. 212.

IN RE THE NEWBRIDGE SANITARY STEAM LAUNDRY, LTD.

(1915. No. 490.)

M. R.
1915.
July 13.
—
Appeal.
1915.
Dec. 13, 14.

Company — Winding up — Shareholders' Petition — "Just and Equitable" Clause — Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *sect.* 129, *sub-s.* 6—*Appropriation of Profits by Managing Director—Vicious Career.*

The power of the Court to order the winding up of a company as being just and equitable under sub-s. 6 of sect. 129 of the Companies (Consolidation) Act, 1908 (corresponding to sect. 79 of the Companies Act, 1862), is not confined to cases the circumstances of which are *ejusdem generis* with those mentioned in the preceding sub-sections.

L., the managing director of a laundry company, entered into contracts in his own name for work to be done by the company, the profits of which amounted to £3268, of which L. accounted to the company for £1038 only. This he alleged was done with the consent of his co-directors. The capital of the company consisted of 2000 £1 shares, the majority of which were controlled by the managing director, and a co-director who was a business partner of L. In an action brought by two shareholders against the company and L., to compel an account of the profits so received, an order was made that he should so account; but no payment was made or account rendered by L., and no steps were taken by the company to compel him to account, and subsequent to the action a resolution of confidence in his management was passed by a majority of shareholders at a general meeting.

The plaintiffs in the action having presented a petition to wind up the company on the ground that in the circumstances it was "just and equitable" that the company should be wound up:

Held, by the Court of Appeal, affirming the decision of the Master of the Rolls, that a winding-up order should be made.

PETITION.

This was a petition to wind up the company presented by two shareholders, Alexander Cockburn and Louisa Cockburn.

The petition stated that the company was incorporated under the Companies Acts in November, 1896, with a nominal capital of £2000, divided into 2000 shares of £1 each, of which 1990 were ordinary shares, and ten founders' shares. The amount of capital paid up, or credited as paid up, was £2000. There

M. R. 1915.

In re Newbridge Steam Laundry Co.

were only thirteen shareholders. Alexander Cockburn held 100 ordinary shares; Louisa Cockburn held 540 ordinary shares, and four founders' shares. There were three directors, viz., William Thornton, Henry Church, and Thomas J. Llewellyn. The last-named was managing director. He held 275 ordinary shares, and two founders' shares. William Thornton held 100 shares. William Beck, the secretary, held 200 shares. Henry Church was not a shareholder, nor a member of the company. The company was established to carry on the industries of laundry work, dyeing, and cleaning, and carpet-beating, &c. The last dividend was declared in June, 1912, but not paid until November, 1912, after the petitioners had made representations to the Board of Trade. The petitioners alleged that if the accounts were properly taken, and the accounting parties made responsible, there would have been large surplus profits after paying the 8 per cent. dividend mentioned in the memorandum of association. The petition further stated that the managing director, Thomas J. Llewellyn, had entered into numerous valuable contracts in his own name, and had had the work done by the company, and had not accounted for the profits.

The petitioners instituted an action on behalf of themselves and all other shareholders against the company and the managing director, seeking to have him declared liable to account to the company for the profits. By an order of the Court of Appeal on November 13th, 1914, in the action, the defendant Thomas J. Llewellyn was declared to be a trustee for and liable to pay to the company all sums he received on foot of the contracts referred to, and an inquiry was directed what sums the said defendant had so received: *Cockburn* v. *Newbridge Steam Laundry Company, Ltd.* (1). The chief clerk's certificate, filed on the 23rd April, 1915, found that £2230 1*s.* 7*d.* was due by Thomas J. Llewellyn to the company. Since the commencement of the action the petitioners had ascertained that Thomas J. Llewellyn, who was a coal merchant, had been paid about £400 by the company for coals alleged to have been supplied by him to the company, and that another director, William Thornton, had been allowed a discount of 33⅓ per cent. on the amount of the work done for him by

(1) [1915] 1 I. R. 237.

the company, and the petitioners charged that the said work was done at a loss to the company. The petitioners submitted that the officials of the company were answerable to the company in a winding up for the losses accruing to the company by reason of the said irregularities.

After the hearing of the action on the 29th April, 6th and 7th May, 1914, pending the judgment, Thomas J. Llewellyn transferred the majority of his shares in the company, viz., 275 ordinary shares, to Messrs. Heiton & Co., Ltd., and retained only two founders' shares. The petitioners contended that the transfer was irregular and void, and that the transfer was made to Messrs. Heiton without or for a past consideration. All the shares, save the petitioners', and possibly Messrs. Heitons', were controlled by Thomas J. Llewellyn and William Thornton, and the petitioners and the remaining independent shareholders (if any) were in a minority, and could not control the action of the company. The company had carried on a highly successful and valuable business, and the assets, if properly realized, would have left a large balance for distribution amongst the petitioners and other shareholders, after paying all the liabilities in full.

Having regard to all these matters, the petitioners submitted that it was just and equitable that the company should be wound up compulsorily. The petition was supported by an affidavit made by the petitioner Alexander Cockburn.

Mr. William Hewat, managing director of Messrs. Heiton & Co., made an affidavit stating that the paragraph in the petition alleging that the transfer of the shares to Messrs. Heiton & Co. was made to them without or for a past consideration was wholly inaccurate. The fact was that in December, 1913, Thomas J. Llewellyn was indebted to Messrs. Heiton in the sum of £2000. This was a liability of years' standing, and had arisen in connexion with the supply of coal by Messrs. Heiton to him for sale when in his business at Naas and Newbridge, and Messrs. Heiton agreed with him to take over his coal business and premises, together with certain shares in the laundry company. Thomas Llewellyn did not inform the company that the shares were pledged or deposited with any bankers or person, but when Messrs. Heiton & Co. referred the matter to their solicitors to take

M. R. 1915.

In re Newbridge Steam Laundry Co.

over the deeds of the premises, they found that the certificate for these shares had been deposited by Llewellyn with the Hibernian Bank, and were held by it as security for two accounts. Further inquiries of the bank elicited that these shares were held not only as security for the private account of Thomas J. Llewellyn, but also as security for a separate joint account of Thomas J. Llewellyn and William Beck, the secretary of the laundry company, and in order to release the scrip, the Hibernian Bank required that Messrs. Heiton should obtain the consent of Mr. Beck. Eventually, in order to release these securities, Messrs. Heiton decided to pay off the personal obligation of Thomas J. Llewellyn to the bank as distinct from his obligation on the joint account with Mr. Beck, which account he (Mr. Hewat) was informed stood in the books of the bank as Llewellyn & Co., and accordingly paid the bank £575 12*s.* 10*d.*, in exchange for the deeds of the premises and the scrip of the shares. If the petition intended to suggest that there was any collusion whatever between Messrs. Heiton & Co. and Thomas J. Llewellyn for the purpose of prejudicing or defeating the claims of the third parties against him, he (Mr. Hewat) absolutely repudiated any such suggestion, and stated that the only motive that inspired Messrs. Heiton in taking such transfer was to protect their interest in relation to the heavy indebtedness of Thomas J. Llewellyn.

An affidavit was made by William Beck, the secretary, to resist the application for winding up. He stated that the fact that no dividend was paid since the year 1912 was solely due to the action brought by the petitioners, and that all the available cash had to be requisitioned to defend that action. It was not true that the reason of there being no dividend paid since 1912 was because the accounts had been improperly taken and the accounting parties had not been made responsible. The only contracts entered into by Thomas J. Llewellyn in his own name or otherwise, the work of which was carried out by the company, were the contracts for the military hospital washing, which was the subject-matter of the action brought by the petitioners. It was true that Llewellyn did supply coal to the company, but that was with the full sanction and knowledge of all the shareholders, including the petitioners, and was not considered wrong or illegal.

It was true that Thornton was allowed a discount of 33⅓ per cent. on his washing account with the connivance of Llewellyn; but that arrangement was well known to all the company, and all the directors received the benefit of it, including the petitioner, Louisa Cockburn, while she was a director.

As regards the statement that Llewellyn had parted with his shares, he stated that under old Table "A," under which the company was incorporated, no qualification as to holding shares was necessary to validate the holding of office by a director. It was not true that all the shares except the petitioners and Messrs. Heiton's were controlled by Llewellyn and Thornton. He (Beck) held thirty ordinary shares; his father's executors held two hundred shares and three founders' shares; his wife, Maria Beck, held two hundred and sixty ordinary shares, and James Kearney held ten ordinary shares—none of whom was in any way controlled or influenced by Llewellyn or Thornton, nor was Thornton controlled or influenced by Llewellyn. The minority consisted of the petitioners; all the other shareholders were satisfied with the management of the company by its present officers, as appeared from the following resolution passed at a general meeting of the company on July 8th, 1914:—

"We, the shareholders of the Newbridge Sanitary Steam Laundry Company, Limited, avail ourselves of the opportunity to express our entire confidence in Mr. Llewellyn for the very great interest which he has taken in the affairs of the company since its establishment, and of the way in which he conducted and developed its business. We regret that the company and Mr. Llewellyn have been subjected to the proceedings instituted by Mr. and Mrs. Cockburn. We approve of the action of the directors in connexion with the same, including the defence of the company's interests upon Mr. and Mrs. Cockburn's pending appeal. We have every confidence in the future guidance of the affairs of the company by the directors."

This resolution was proposed by Mrs. Beck and seconded by Mrs. Gallagher, and passed unanimously.

Beck said, in conclusion, that any losses that the company had been put to since the commencement of the said action had been solely caused by the petitioners themselves, all the other share-

M. R. 1915.

In re Newbridge Steam Laundry Co.

holders being perfectly satisfied with their dividends. The company, in his opinion and that of the directors, had a bright and hopeful prospect, although at present suffering from the absence of troops from Newbridge and the Curragh; and it was in the best interests of the shareholders that the petition should be dismissed.

Dickie K.C. and *Overend*, in support of the petition :—

The ground of the application for a winding-up order is, in the words of sect. 129, sub-s. 6, of the Companies Act, 1908, that it is "just and equitable" that the company should be wound up. The gross default of Llewellyn was established by the judgment of the Master of the Rolls, delivered on June 5th, 1914, and yet on July 8th, 1914, a resolution of confidence in Llewellyn was passed at a general meeting of the company. The only way to get money from Llewellyn is by winding up the company. Even when there is nothing at all to wind up, an order may at times be justified as a means of bringing to an end a vicious career: *per* Buckley J., in *Re Crigglestone Coal Company, Limited* (1). The resolution passed by the company in favour of Llewellyn shows that it will be conducted in the same way as before. The Court will protect a minority of shareholders from being unfairly treated, and will make a winding-up order if necessary: *In re Consolidated South Rand Mines Deep, Limited* (2), following the observations of James L.J. in *Menier* v. *Hooper's Telegraph Works* (3). The words "just and equitable" in sub-s. 6 are not confined to cases *ejusdem generis* as the cases in the preceding sub-sections: *Australian Joint-Stock Bank* (4); *Sailing Ship "Keutmere" Company* (5). In the former case an order was made to enable a scheme of arrangement to be carried; in the latter to get rid of a deadlock. In *In re Thomas Brinsmead & Sons* (6) an order was made as the best means of recovering from the shareholders money dishonestly retained by promoters.

(1) [1906] 2 Ch. 327, 333.
(2) [1909] 1 Ch. 491, 499.
(3) L. R. 9 Ch. 353.
(4) W. N. 1897, 48.
(5) *Ib.* 58.
(6) [1897] 1 Ch. 406.

The Solicitor-General (*James O'Connor K.C.*) and *Cecil Eforde*, for the company:—

No case has been made for a winding-up order. The majority of the shareholders are opposed to a winding up. It is not suggested that the company is insolvent. If anything can be recovered from Llewellyn, it can be recovered in the action. The company took no steps to make Llewellyn account, as he was not worth suing, and nothing could result from a *fi. fa.* There was no order made in the action restraining Llewellyn from acting as director. The contracts made by him which were complained of have terminated, and there is no evidence that similar contracts will be entered into. The Act of 1908 made no change in the law. The result of the cases under sect. 129 is well stated in Gore Browne's Joint-Stock Companies (1915 ed.), p. 444. The cases cited on the other side do not apply. In *In re Brinsmead* (1) the company was a bogus one. Here the company is a genuine one, and should be allowed to continue to carry on its business. Misconduct as a director is no ground for winding up: *In re Anglo-Greek Steam Company* (2); nor is the mere fact that moneys were given to persons who became directors: *Re Bwlch Y Plwm Company, Limited* (3). They also cited *In re The Anglo-Egyptian Navigation Company* (4); *In re The National Live Stock Insurance Company* (5).

Blood K.C., for Messrs. Heiton.

Overend, for the petitioners, was not called on to reply.

O'CONNOR M.R.:—

It is best to get rid at once of the accusation in the petition against Messrs. Heiton. They did nothing improper. They sought to secure themselves against a debt which was due to them, that is all.

With regard to the application for a winding-up of the Company, it is based on the ground that it is just and equitable that it should be wound up. The facts of the case are shortly these. It was proved in the action of *Cockburn* v. *The Newbridge Steam Laundry Co. and Llewellyn* (6) in this Court and in the

(1) [1897] 1 Ch. 406.
(2) L. R. 2 Eq. 1.
(3) 17 L. T. 235.
(4) 21 L. T. 19.
(5) 26 B. 153.
(6) [1915] 1 Ir. R. 237.

M. R. 1915.

In re Newbridge Steam Laundry Co.

Court of Appeal that Thomas Llewellyn, the managing director of the company, was guilty of great irregularities in the management of the company, which did not fall far short of criminal dealings.

After the termination of the proceedings in this Court and in the Court of Appeal, any independent shareholder might have reasonably expected that the result of those proceedings would be that Llewellyn would be dismissed from the post of managing director, or, if not, that he would at least be subject to some proper control, and, if he were allowed to remain a director, that he would be prevented from exercising any financial control. The petitioners complain that the management of the company goes on in the same way as before. They say that they have no guarantee from the directors that they (the plaintiffs) will be protected from other similar frauds or irregularities. I dismissed the action brought by the plaintiffs against the company and Llewellyn on the ground that the plaintiffs sued as two individual shareholders, and that the institution of the action was a matter for the majority of the shareholders to decide, and that they ought not to be over-ruled by a minority, but I added that it would be otherwise if the case was made and established that Llewellyn controlled the majority of the shareholders, and unfairly influenced them in his own interest.

In this petition it is alleged that Llewellyn has control of all the shareholders other than the petitioners; it is easy to see why this is so, because five of the shareholders are members of his family, and Beck, the secretary, who always worked together with Llewellyn, and the members of his family, hold 493 shares.

But Beck's affidavit supplies any proof, if proof were wanted. It is surprising that a person in his position should make such a statement as he does in his affidavit. He says that on July 8th, 1914, the following resolution was passed at a general meeting of shareholders.

[His lordship read the resolution (*ante*, p. 71).]

This was just a month after the judgment of this Court had been given. I cannot interpret that resolution as anything more than an adoption by the majority of the shareholders of what had been done by Llewellyn in the past. They, in fact, became *participes*

criminis with him, and they are the persons who continue to have the control of the management of the company. Can the plaintiffs have any confidence in this company in the future? They can have none in Llewellyn, nor in Beck, who shows such a want of propriety in putting forward this resolution as an answer to the petition. The Court does not like to interfere with the domestic tribunal of shareholders, as it is called, but this is not the case of a domestic tribunal of shareholders, but one composed of the Llewellyn family and Beck, who can outvote the other shareholders. Therefore the authorities which have been cited on behalf of the company do not apply. I do not see how the petitioners can, with any confidence, allow their interest in the company to continue to be controlled by Llewellyn and those who are associated with him, and who have such little sense of propriety as to adopt the resolution I have referred to. In the circumstances I see no course open to the petitioners for freeing themselves and their property from the vicious management from which it has suffered than to wind up the company. An independent person will then be appointed, who can realize the property and take proceedings to enforce the judgment of the Court against Llewellyn. It will be his duty to inquire into the conduct of Llewellyn and that of any of the officers of the company whose conduct appears to him to require investigation. I must refer it to chambers to appoint a liquidator, and reserve the question of costs.

W. L.

The company appealed to the Court of Appeal.

Dec. 16.

The Solicitor-General (*James O'Connor K.C.*) and *Serjeant Matheson K.C.* (*C. Fforde* with them), for the appellants:—

We contend that the Court has no jurisdiction to make an order for the winding up of this company, but, if it has, the order should not be made, as it would not enure for the benefit of any person. *In re Crigglestone Coal Co., Ltd.* (1). The company is a solvent one; it pays a dividend, and no part of the substratum has disappeared. No one desires a winding up save the petitioners. The company is not responsible for the acts of Llewellyn, and, even if it were, no continued illegality is alleged, much less

(1) [1906] 2 Ch. 327.

Appeal. 1915.

In re NEWBRIDGE STEAM LAUNDRY. CO.

proved. The power to wind up a company is conferred for the benefit and protection of those beneficially interested in the company, not to prevent criminality if such exists. It is open to the petitioners to take proceedings against Llewellyn if they so desire; if he in fact is continuing to take contracts in his own name, he can be restrained by injunction in the action, but there is no evidence that he is doing so. It is proved that Llewellyn is a man of no means, and that is a sufficient reason why the company should not squander its assets in taking further steps against him. The company has confidence in him, and has passed a resolution to that effect, because of his past success in the management of the business, and because they consider the best interests of the company will be served by his continuance in the position of managing director. That being so the Court ought not to put an end to the existence of the company. We submit that there is no jurisdiction to do so under sub-s. 6 of sect. 129 of the Companies (Consolidation) Act, 1908, which is confined to cases *ejusdem generis* as those dealt with in the preceding sub-sections. The present case does not come within any of these. See the judgment of Lord Romilly M.R. in *In Re Anglo-Greek Steam Co.* (1) and of Lord Cairns in *In Re Suburban Hotel Co.* (2); In *In Re Thomas Edward Brinsmead & Sons* (3), where a winding-up order was made under the corresponding section (sect. 79) of the Companies Act, 1862, portion of the substratum of the company was gone. Lord Justice Buckley, in his work on the Companies Acts (9th ed., p. 304), states that sub-s. 6 "should be interpreted in reference to matters *ejusdem generis* as those in the previous clauses," although he states that the tendency of the Courts is to give "a somewhat wider meaning under special circumstances." No special circumstances exist here; it is not a bubble company; no part of the substratum has gone; there is no dead-lock or vicious career or continued illegality. The only result of a winding-up order will be to destroy a prosperous, though small, concern.

They also cited *Symington* v. *Symingtons' Quarries, Ltd.* (4); and *Re Welch Y Plwm Co., Ltd.* (5).

(1) L. R. 2 Eq. 1.
(2) L.R. 2 Ch. App. 737, at p. 749.
(3) [1897] 1 Ch. 45.
(4) 8 Sess. Cas. 121.
(5) 17 L. T. N. S. 235.

A. A. Dickie K.C. and *Overend*, for the respondents:—

It is clear that Llewellyn, although ordered to account to the company, has not done so, and will not; and that the company has ratified and adopted his conduct. This is shown by the resolution passed by them. The result in effect is that a majority of the shareholders "have put a sum of money into their pockets at the expense of the minority," and the minority have accordingly the right to present their petition for winding up, so as "to have their share of the profits ascertained for them in the best way in which the Court can do it, and give it to them." See judgment of James L.J. in *Menier* v. *Hooper's Telegraph Works* (1); adopted in *In Re Consolidated South Rand Mines Deep, Ltd.* (2). If the petition be refused, the petitioners, being in a minority, are without remedy. Llewellyn is a trustee for the company, not for individual shareholders, and therefore the procedure by debtor's summons is not open to the petitioners: *Re Firmin* (3). The *ejusdem generis* principle of construction is no longer applicable to sect. 129, sub-s. 6, of the Act of 1908. See Lindley's Law of Companies (6th ed., p. 852); Lord Halsbury's Laws of England (vol. v, p. 397). *In re Thomas Edward Brinsmead & Sons* (4); *In re Amalgamated Syndicate* (5); *In re Chic, Ltd.* (6); *In re Alfred Melson & Co., Ltd.* (7); *In re Crigglestone Coal Co., Ltd.* (8). Where one partner embezzles money, the Court will at once dissolve the partnership at the instance of the other: *Essell* v. *Hayward* (9). [They also referred to *In re Diamond Fuel Co.* (10); *In re Electric Telegraph of Ireland* (11); and *London and County Coal Co.* (12).]

The Solicitor-General, in reply.

Cur. adv. vult.

(1) L. R. 9 Ch. App. 350, at p. 353.
(2) [1909] 1 Ch. 491.
(3) 57 L. T. N. S. 45.
(4) [1897] 1 Ch. 406.
(5) [1897] 2 Ch. 600.
(6) [1905] 2 Ch. 345.
(7) [1906] 1 Ch. 841.
(8) [1906] 2 Ch. 327.
(9) 30 Beav. 158.
(10) 13 Ch. D. 400.
(11) 22 Beav. 471.
(12) 3 Eq. 355.

Appeal.
1915.
In re
NEWBRIDGE
STEAM
LAUNDRY
Co.

SIR IGNATIUS J. O'BRIEN L.C.:—

This case comes before us on an appeal by the majority of the shareholders against an order of the Master of the Rolls for the compulsory winding-up of this small company. Counsel for the appellants have pressed upon us the argument that the Court has no jurisdiction to wind up the company, and further, that, if such jurisdiction exists, it ought not to be exercised in the circumstances of the present case. The appellants' main contention is that Clause VI of sect. 129 of the Companies (Consolidation) Act, 1908 (1), corresponding to sect. 79 of the Companies Act, 1862, confers no independent equitable or statutory jurisdiction to make an order for the winding up of a company, but that under this clause the Court is confined to the consideration of matters *ejusdem generis* as those dealt with in the preceding five clauses; and the judgment of Lord Cairns, then a Lord Justice of Appeal, in *In re Suburban Hotel Company* (2) has been relied upon as a strong authority in favour of the appellants' contention. I shall deal later on with this contention, but I must advert to the facts proved in the present case; and I may say in passing that, in my judgment, it would be a lamentable thing if the Court were, owing to any technical rule of construction, to find its hands so tied as to be unable to do what, as it appears to me, is only elementary justice to the petitioners.

The company, when formed, was a small one; in fact, the earning of a net profit of £200 in any one year would have enabled the company to pay a dividend of in or about 20 per cent. on their capital to the shareholders,—a matter of some importance in considering the circumstances which have arisen. It was formed in the year 1896 by a Mr. Cockburn, who is now dead, but is represented by his widow and son, and by two men named Llewellyn, one of whom only, Mr. Thomas Llewellyn, figures in the present case. There seems to have been some difficulty at first in putting the company upon a successful footing; indeed the question of winding up appears to have been considered in the year 1908, but Mr. Cockburn and Mr. Llewellyn, both of whom

(1) Sect. 129. A company may be wound up by the Court—(vi) if the Court is of opinion that it is just and equitable that the company should be wound up.

(2) L. R. 2 Ch. A. 737.

seem to have been men of energy and business capacity, ultimately succeeded in bringing the company into the position of being a dividend-paying concern. The business of the company consisted of laundry work, considerable scope for which was afforded by the proximity of the laundry works to the large military establishment popularly known as the Curragh Camp, where numbers of military officers and their families reside, and where contracts for laundry work in connexion with the military were to be obtained. The total nominal capital of the company was £2000, which was subsequently augmented by the sum of £550 secured by the issue of debentures in or about the year 1910, when, according to the evidence, it was decided to erect certain new buildings for the carrying on of additional laundry work. The entire capital was paid up, and the shareholders are under no liability for calls. The company also possessed certain freehold premises valued at £156, together with buildings and fittings, etc. Llewellyn, owing apparently to his great business capacity, appears in the year 1901 and thenceforward under the description of managing director. Prior to that he had acted as chairman of the directors. There is no provision in the memorandum of association empowering the appointment of a managing director, and I desire to emphasize this, because the fact of his being appointed and acting as such shows the highly important position he held and the influence he wielded in the company. The accounts disclose that he received a salary of only £80, a small amount for the work he had undertaken on behalf of the company. Prior to the present proceedings Llewellyn held 275 shares in the company, and the circumstances under which these shares were transferred by him are not without importance and significance. A man named Beck, who plays an important part in the case, owns 30 ordinary shares; Thomas Llewellyn and George Llewellyn own between them 10 shares; Mrs. M. A. Llewellyn, wife of Thomas Llewellyn, owns 325 shares: James Kearney owns 10; Mrs. M. Beck, wife of Aaron Beck, owns 260; Lousia and Alexander C. Cockburn, own 640 between them; Mrs. Gallagher, a daughter of Thomas Llewellyn, owns 40; Miss N. S. Llewellyn, another daughter of Thomas Llewellyn, owns 100; and Wm. Henry Thornton, whose position in the case also requires consideration,

Appeal. 1915. *In re* Newbridge Steam Laundry Co. Ignatius J. O'Brien L.C.

owns 100 shares; whilst Heiton and Co. hold 275 shares. The net result is that the Cockburns hold 640 shares, and the Llewellyns and the Becks hold 1045 between them.

The position of this small concern was thus such that practically but two families were interested in it, of whom one, the Cockburns, were in a minority, and never could impose their wishes, be they right or wrong, on the majority of the shareholders, represented by the Llewellyn and Beck families. That is a position which, when private individuals form themselves into limited companies, must sometimes occur, and against which there is no remedy so long as the company is managed on ordinary business lines, and fairly and without impropriety as between the several shareholders; but there is a limit to the endurance which the minority of shareholders must display, and that limit has, to my mind, been reached in the present case, because I am satisfied on the evidence before us that the action of the majority of the shareholders in this case was intended solely to shield Mr. Thomas Llewellyn, and to prevent any effective proceedings being taken against him with a view to compel him to recoup to the company a sum of money exceeding £2000—more than the equivalent of the capital of the company—which, beyond all doubt, he has received and has never accounted for, and which probably he never will account for if this petition be dismissed. The circumstances in which he came to be an accounting party to the company are singular, and are the subject of a reported decision of this court. Mr. Cockburn died in 1908, and after his death an increase of the buildings of the company for the purpose of affording more accommodation for the laundry business was undertaken, but the whole of the sum of £500 borrowed on the security of debentures as already mentioned, which was alleged, and which I must assume for the present, to have been subscribed, was not expended in the erection of buildings. In round numbers about £300 was expended in that way, and £200 was applied as far as I can see in liquidating certain current liabilities which it was not lawful to liquidate out of capital or out of moneys so borrowed. That, however, is a matter which merely lies on the fringe of the larger question we have to consider. The debentures were undoubtedly issued, and

they are held by members of the Llewellyn family. There was some controversy during the argument as to whether they were not the property of Mr. Thomas Llewellyn himself; his name does not, however, appear in the books of the company as owner of these debentures. Now it appears that Mr. Thomas Llewellyn, who had become the managing director of the company, and who always, without a single exception, occupied the chair at the meetings of the company, conceived the idea of obtaining, in what I may call a back-stairs method, contracts for washing in connexion with a certain hospital at the Curragh which was Government property. It was suggested that it was desirable to conceal the fact that this laundry company was engaged in the doing of washing for a hospital, and that may perhaps have been the idea in the minds of the majority of shareholders. With regard to the Cockburns, the Master of the Rolls in the previous action came to the conclusion—and this court affirmed his view—that Mrs. Cockburn was a mere cypher in the company, and not allowed to interfere actively in any way with the management, while her son did not seem to possess the necessary force of character to impress upon the majority of the shareholders the views of his mother and himself, assuming it to have been possible for him to have done so. There is no doubt as to what followed. Llewellyn, the chairman of the company, the managing director, the man who through his own family was the effective controller of the company, entered into extensive contracts in his own name with the Government for washing to be done in connexion with a hospital at the Curragh. He received on foot of these contracts a sum of £3268 to be paid to the company—in fact, he paid only a sum of £1038, leaving £2230 unaccounted for.

In these circumstances an action was brought by Mrs. Cockburn and her son, which, in substance, asked that Llewellyn should be declared a trustee for the company of the moneys he had so received, and that he should account to the company for them. One would have thought that Llewellyn, assuming his intention to have been straightforward, would have then fully accounted to the company, but instead of that he seems (and I say distinctly "he," because he is the *deus ex machinâ* throughout the case) to have done everything in his power to oppose the enforcement of a proper account

Appeal. 1915.

In re Newbridge Steam Laundry Co.

Sir Ignatius J. O'Brien L.C.

by him in respect of this sum of £2230, which, on the face of it, he must be presumed to have put in his own pocket. The writ in that action was issued on the 13th February, 1913, and the statement of claim was delivered on the 11th April, 1913. Two defences were, in form, put in, one by the company and one by Llewellyn, and their object was, in my opinion, to shield Llewellyn, and to prevent judgment being obtained against him. In the defence of the company I find this remarkable plea:—

"The said T. J. Llewellyn was for many years prior to the formation of the said company the chief local contractor to the Government, and for many years prior to and up to the formation of the said company he had the War Office contracts for laundry work referred to in the third paragraph of the statement of claim. Since the formation of the said company the said T. J. Llewellyn has, with the knowledge and approval of the said company, and in its interests, continued to apply for the said army contracts in his own name, though on behalf of the said company, and he has handed over all the profits of the said contracts to the said company, and has fully accounted for the same to the satisfaction of the said company and its auditors."

That was the defence put on the file of the Court by this company, but the statements contained in it do not bear the slightest resemblance to the actual facts. Llewellyn did not hand over the profits of these contracts to the company, and it was the merest farce to speak of his having accounted for them to the satisfaction of the company and its auditors.

It is now stated that the shareholders were ignorant of these matters, and that they only learned the real truth when the case came before the Master of the Rolls, and a large sum of money was proved in pounds, shillings, and pence not to have been accounted for. In ordinary circumstances one might make some allowance for the gullibility of some of the members of the company in accepting, and being deceived by, Llewellyn's statements as to his own good faith and conduct in connexion with these contracts, but I do not think that they were deceived by Llewellyn.

Meetings of the directors were held, at which it was arranged that the funds of the company should be expended in resisting

an action which should never have been resisted. The minute of the directors of a meeting on the 21st March, 1914, at which Llewellyn, Thornton, and Beck were present, records that the position of the company generally was discussed, "particularly as regards pending action, and it was still considered that the directors had no option but to go on defending the same." This minute was, as are all others, signed by Llewellyn.

The real relationship between Thornton, Beck, and Llewellyn is somewhat obscure, but a corner of the curtain has been raised. It appears that Thornton, who was a director of the company, was himself a debtor to the company in a sum of £240. That sum, if repaid, would have enabled a further dividend of between 8 and 9 per cent. to have been paid, in the same way as if a moiety of the £2300 received by Llewellyn had been accounted for by him, it would have recouped the shareholders of the company for in or about a moiety of the capital. We find, then, that Llewellyn had pocketed £2300, moneys of the company, and Thornton was a debtor to the company in the sum of £240. Neither of them paid. Thornton, however, claimed to be entitled to a discount of 33 per cent. upon the amount which he owed. Be it so; that would leave £160 owing by him, the payment of which alone would have enabled a substantial dividend to have been paid. Thornton did ultimately satisfy his debt to the extent of 7*s.* 6*d.* in the pound, and I assume that the company acquiesced in the arrangement. These are the two directors who voted away the moneys of the company to defend an action which, as I have said, should never have been defended, and who for this purpose put false statements on the file of the Court.

Now the shares which had previously been in the hands of Llewellyn were transferred to Heiton & Co., who were creditors of both Llewellyn and, I think, also of Beck, but certainly of Llewellyn. The present petitioners were not correct in suggesting as they did that this was a fraudulent transaction. It does not appear to have been so, but in order to prove that it was an honest transaction it was necessary, as I have said, that a corner of the curtain should be lifted, and this is what was disclosed. These shares were held not only as security for the private account of Thomas Llewellyn (in respect of which account Beck was a

Appeal. 1915.

In re Newbridge Steam Laundry Co

Sir Ignatius J. O'Brien L.C.

guarantor to the Bank), but also as security for a separate joint account of Llewellyn and Beck. We have it then that Llewellyn, the so-called managing director, was indebted to the company in the sum of £2000; Thornton had paid part of his debt by a composition; and Beck, who knew all about Llewellyn, was a partner of the latter's in another trade transaction, and Llewellyn's shares were pledged not only to secure his own private account with the trade, but also the separate joint account of himself and Beck. These were the three controlling directors who proceeded to vote away the funds of the company, and who induced the company to defend the action on the ground that Llewellyn had accounted for everything he had received, although they knew that, in fact, he had not. The action came on for hearing. Llewellyn, the so-called managing director, was placed in the witness-box, and on being asked as to the amounts of these contracts which he had obtained in his own name, he claimed privilege on the ground that his answer would incriminate himself. He afterwards withdrew from that position, and said that he could not answer, as he did not know; that he had no books in which he recorded the amounts. And yet he had expended the moneys of the company in putting this defence on the file of the Court that he had paid over to the company, and had accounted for, to the satisfaction of the company, all the profits of these Government contracts. Subsequent to the trial of the action a remarkable general meeting of the company was held on the 8th July, 1914. It was then proposed by Mrs. Beck, and seconded by Mrs. Gallagher, that "We, the shareholders of the Newbridge Sanitary Steam Laundry Co., Limited, avail ourselves of the opportunity to express our entire confidence in Mr. Llewellyn for the very great interest which he has taken in the affairs of the company since its establishment, and of the way in which he conducted and developed its business. We regret that the company and Mr. Llewellyn have been subjected to the proceedings instituted by Mr. and Mrs. Cockburn. We approve of the action of the directors in connexion with the same, including the defence of the company's interests upon Mr. and Mrs. Cockburn's pending appeal. We have every confidence in the future guidance of the affairs of the company by the directors." This resolution is recorded as having been carried unanimously.

On the same day a meeting of the directors was held, Llewellyn Thornton, and Beck being present, the minute of which reads as follows:—"After the general meeting the directors considered the general position of the company, and decided to continue the present methods of management and contracting." Could anything be more vicious in the management of a limited company, or more unfair to the dissentient minority of the shareholders? Llewellyn, who had misappropriated £2230 of the company's moneys, has in his own hands the controlling voting power at every general meeting; he is himself, with Thornton and Beck, a controlling director; everything he does is supported by the directors and the company. In these circumstances can it be said that the company is carrying on its business in a way which is fair and just towards the dissentient shareholders? Of course the meeting approved of the action of the so-called board of directors; it would have been a strange thing if the families of Llewellyn and Beck had not done so.

We find, then, these shareholders, composed of the Becks and Llewellyns, segregating themselves into an entity apart from the company itself and from the other shareholders, and insisting that the action of one of their body was right, and that he had acted honestly, when, in fact, he had acted in a way which was grossly dishonest, and had at that date been proved to have done so. The resolution can bear no other meaning but that. Notwithstanding all that has occurred, they were determined to support Llewellyn, and to expend the moneys of the company and of the petitioners in preventing, if possible, Llewellyn being made amenable to justice; and that is a position of the company which in my judgment fully justifies the prayer of the petition. When the original action came before the Court, we made a decree requiring Llewellyn to account for all moneys found due by him to the company in the taking of the accounts. Accounts were taken, but Llewellyn appears to have paid no attention to them or to the order of this Court. It was proved, as I have mentioned before, that he had obtained a sum of £3268 from army contracts. He paid to the company £1038, and he has at no time accounted for the balance. It was suggested that Llewellyn paid away the money representing this balance in secret commissions on behalf of

Appeal. 1915.

In re Newbridge Steam Laundry Co.

Sir Ignatius J. O'Brien L.C.

the company. For my part, I do not believe that this was the case, and there certainly was no evidence of any such payments having been made; but the real question which now arises is, to my mind, this: If this order for winding up be not made, will Llewellyn ever pay his debt to the company? The present petition is based on several matters, to some of which I do not attach much importance; but the material averment is contained in paragraph 16 of the petition:—"Your petitioners submit that the company has been carried on in the past, not for the benefit of the shareholders, but largely for the benefit of persons who were trustees for the shareholders, and who control (although they have no beneficial interest in) the majority of the shares, and that the only mode by which such persons can be forced to account and make payment to the company, and in which the business and assets can be saved for the shareholders, and the said payment and proceeds secured for the benefit of the shareholders, is by a winding up under the Court. And your petitioners submit that, having regard to the matters aforesaid, it is just and equitable that the company should be wound up compulsorily." That is the real relief to which the petitioners are entitled. A remarkable affidavit was filed by Mr. Beck; Llewellyn would not account. The company, in my judgment, will never compel him to account, but at the eleventh hour the only case which is sought to be made is to be found in this affidavit of Mr. Beck. He says:—"Mr. T. J. Llewellyn, who has been found indebted to the said company in the sum of £2230 11*s.* 7*d.*, has not now, and has not at any time since the institution of the proceedings in this matter, any means whatsoever of paying the said sum of £2230 11*s.* 7*d.* or any part thereof. The said T. J. Llewellyn has no occupation except being a director of said company, for which he receives a salary of £80 per annum." Mr. Beck, the partner of Llewellyn, is the man selected to depose to the business affairs of Llewellyn, who is himself silent on this subject. Down to the present moment nothing has been done by the company to compel Llewellyn to account for the moneys, in respect of which this Court has decided that he is bound to account, and nothing will be done. It has been suggested that the company is actuated by high motives of economy in not pursuing remedies which might result in loss.

Appeal.
1915.
In re
NEWBRIDGE
STEAM
LAUNDRY
CO.
Sir Ignatius J.
O'Brien L.C.

If so, I can only say that it would have been better if the company had acted in accordance with these motives at an earlier period, and had refrained from entering a defence to the action. Then it is said that it is for the Cockburns to make this order fruitful if they choose to do so; but the company will not do so. That is a singular way of discharging a serious obligation of a company towards a minority of its shareholders. If the company had not been in this very peculiar position, but had been deceived by Llewellyn but willing and anxious to discharge its duty, it would not have hesitated a moment before issuing a debtor's summons against him. The procedure by a debtor's summons would have enabled the true history of these transactions to have been ascertained, whether Llewellyn liked it or not; and the company could at the eleventh hour have been placed in a position such that the directors could say, "We have done our best."

I find as a fact that throughout this case the majority of the shareholders of the company have had no other intention than to shield Llewellyn, and I repeat that a winding-up order affords the only means of enabling justice to be done to the petitioners. It is said that the Court is paralyzed, and that there is no jurisdiction to make the order. I decline, however, to accede to the proposition that the words of sect. 129 of the Companies (Consolidation) Act, 1908, to which I have already referred, are not sufficiently wide to enable justice to be done. Now, in the earlier cases in which the corresponding section of the Act of 1862 was considered, there is no doubt that a somewhat restricted, not to say narrow, construction was placed on the words of the final sub-section, namely, that this "just and equitable" clause ought to be construed on the *ejusdem generis* principle, and having regard to the matters dealt with in the preceding sub-sections. In the judgment of Lord Cairns in *In re Suburban Hotel Co.* (1), to which I referred at the commencement of my judgment, I find the following passage:—

"The next case referred to was the case of the *Anglo-Greek Steam Co.* (2). The precise point there decided by the Master of the Rolls was, that the misconduct of the directors and of the managers of the company, though it might render them liable to

(1) L. R. 2 Ch. App. 737. (2) L. R. 2 Eq. 1.

Appeal. 1915.

In re Newbridge Steam Laundry Co.

Sir Ignatius J. O'Brien L.C.

a suit, was not a ground upon which the Court would consider it just and equitable to wind up the company. But his Lordship made these important observations. He said (L. R. 2 Eq. 5):—'There are five different rules laid down in sect. 79, and the four previous rules are these.' Then he enumerates the four previous rules which I have already mentioned. 'Then the fifth is—Whenever the Court is of opinion that it is just and equitable that the company should be wound up.' In that case Lord Cottenham laid down, and I have followed him, and all the other Courts, I think, have done the same, that these words are to be considered as referring to matters *ejusdem generis* with the four subject-matters previously stated in the four previous rules."

There is no doubt, therefore, that Lord Cairns in that judgment did adopt what I have termed the restricted construction of this clause, which is first to be found in the judgment of Lord Cottenham. I do not think, however, that this view particularly appealed to Lord Cairns. Later in his judgment he says:—"At the same time I am of opinion that this principle would be satisfied if it were established that the company never had a proper foundation, and that it was a mere fraud, what is commonly called a bubble company . . . In that case the Court would consider that it came within the fifth rule." And he adds: "It is not necessary now to decide it; but if it were shown to the Court that the whole substratum of the partnership, the whole of the business which the company was incorporated to carry on, has become impossible, I apprehend that the Court might, either under the Act of Parliament, or on general principles, order the company to be wound up." Lord Cairns, I think, hesitated to dissent from Lord Cottenham's decision, but he was clearly of opinion that a company might be wound up under this "just and equitable" clause, not only when it was a bubble company, or when the substratum of the company had disappeared, but also when the general principles on which Courts of equity act required it. That he would be right in so thinking is shown by the decision of Vaughan Williams J., and of the Court of Appeal, affirming that decision, in *In re Thomas Edward Brinsmead & Sons* (1). There an order for the winding up of the company was made,

(1) [1897] 1 Ch. 45, at p. 406.

although it was not a bubble company, and although, as distinctly stated by Vaughan Williams L.J., part of the substratum of the company remained. I apply to the present case the words there used by A. L. Smith L.J., on the hearing of the appeal: "Although the words 'just and equitable' have had a narrow construction put upon them, they have never been construed so narrowly as to exclude such a case as this. If ever there was a case in which it was just and equitable that a company should be wound up by the Court, I cannot doubt that that case is this case" (p. 420). For my part I have always felt the greatest difficulty in placing this limited construction on the final clause of sect. 129, because I fail to see what effective force is to be given to it if it is confined to cases coming within the preceding clauses. In this view I am confirmed by modern authority. In Lord Justice Lindley's Law of Companies (6th ed., at p. 852) I find the following passage:—"At the same time, if it can be shown to the satisfaction of the Court that a company, although not insolvent, ought to be annihilated, the Court will order it to be wound up. Proof of inability to commence business after the lapse of a year, *or of continuing fraud*, will induce the Court to put an end even to a solvent company." The statement of the law contained in the article in Lord Halsbury's Laws of England, vol. v, p. 397, dealing with "companies," which is edited by that eminent authority Lord Justice Swinfen Eady, is explicit on this point. "The words as to its being 'just and equitable' to wind up are not to be read as being *ejusdem generis* with the preceding words of the enactment." The authorities cited for that proposition are—*Re Amalgamated Syndicate* (1); *Re Brinsmead & Sons* (2); *Re Sailing Ship "Kentmere" Co.* (3); and reference is also made to *Re Suburban Hotel Co.* (4) and *Re Langham Skating Rink Co.* (5). If that proposition, supervised as it has been by Lord Justice Swinfen Eady, is an accurate statement of the law, it disposes of the argument based upon Lord Cairns' judgment so strongly pressed upon us by the appellants' counsel. The matter is thus dealt with in the last edition of Lord Justice Buckley's work on the Companies Acts

(1) [1897] 2 Ch. 600.
(2) [1897] 1 Ch. 400.
(3) [1897] W. N. 58.
(4) 2 Ch. App. 737.
(5) 5 Ch. D. 669.

Appeal. 1915.

In re Newbridge Steam Laundry Co.

Sir Ignatius J. O'Brien L.C.

(9th ed., 304–5–6): "Sub-s. (vi), although thus worded in order to include all cases not before mentioned, should be interpreted in reference to matters *ejusdem generis* as those in the previous clauses; though the tendency of the Court is now to give a somewhat wider meaning under special circumstances, e.g. if a winding up will be the means of getting rid of a complete deadlock, or putting an end to a vicious career, or if a winding up is desirable in order to enable a scheme of arrangement to be sanctioned." . . . "The 'just and equitable' clause gives the Court power to wind up a company in cases not coming under any of the first four heads, but there must be strong ground for exercising the power at the instance of a shareholder."

An instance of the tendency of the Court to give a wider meaning to the words of the section is to be found in *In re Amalgamated Syndicate* (1), where Vaughan Williams L.J., after referring to the statement of the law on this question contained in the 7th edition of Buckley on the Companies Acts, said: "Without going into details, I repeat what I said during the argument, that the stringency of the *ejusdem generis* rule has been considerably relaxed of late." I think that the view of the learned Lord Justice when he made use of these words, although he does not implicitly so state, was that not only was the stringency of the rule relaxed, but that it had no foundation in point of law.

The later cases which have been cited, *In re Chic, Ltd.* (2); *In re Crigglestone Coal Co., Ltd.* (3); and *In re Alfred Melson & Co., Ltd.* (4), to my mind entirely support the view put forward by the respondents' counsel, but I shall not occupy public time by dealing with these in detail. I have arrived at the clear conclusion that the final clause of sect. 129 of the Companies Act, 1908, ought not to be construed in this restricted way, but that in all cases which cannot be brought under the preceding clauses, but where, having regard to the established principles of courts of equity, justice and equity require a company to be wound up, an order for its winding up ought to made (5).

(1) [1897] 2 Ch. 600, at p. 607.
(2) [1905] 2 Ch. 345.
(3) [1906] 2 Ch. 327.
(4) [1906] 1 Ch. 841.
(5) [See *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine, Ltd.* (1901, A. C.), Lindley L.J., at pp. 234–235.—Ed.]

That being my view of the law, the petitioners in the present case are entitled, in my judgment, to the relief claimed. If it be refused, the result will undoubtedly be, as I have already said, that all the steps hitherto taken to enforce an account by Llewellyn of the moneys received by him will prove abortive. The judgment of the Master of the Rolls must accordingly be affirmed.

RONAN L.J. :—

I entirely agree, and have only a few observations to add. The facts of this case have been very fully discussed, both in the hearing of the former action and in this petition. The learned Master of the Rolls (whose judgment was, however, over-ruled by this Court) was of opinion on the hearing of the action that the dispute between the Cockburns and the company was merely an internal dispute between the shareholders, and that the action could not be sustained at the instance of the minority of the shareholders. He added, however, in his judgment—"It would be otherwise if the defendant Llewellyn controlled the majority of the shareholders, and unfairly influenced them in his own interest." As a result of the further evidence which is now before the Court, I am entirely satisfied that Llewellyn did control the majority of the shareholders, and did unfairly influence them in his own interest. It is stated on affidavit that Llewellyn has no occupation save that of secretary of this company, and no means beyond his salary of £80 paid to him by the company. If in a period of less than three years he obtained from the funds of the company, in addition to his salary, the sum of £2230, which would increase his income during that period to one of approximately £1000 per annum, it might be supposed that the members of his family would not be very anxious, in their capacity of shareholders, to criticize severely the mode in which that increase of income was brought about. The Master of the Rolls was not aware of the fact that Beck and Llewellyn were partners. Beck, Llewellyn, and Thornton were, as appears from the directors' minute-book, the individuals who instructed the solicitor to defend the original action, and he is the solicitor instructing counsel on behalf of the company in this petition before us. When we tried to get any explanation from counsel for the company as to what

Appeal. 1915.

In re Newbridge Steam Laundry Co.

Ronan L.J.

became of the money which remains unaccounted for, the invariable answer was that they did not know.

There has been an absolute suppression of the facts, and I am disposed to think in a case like this, when solicitor and counsel are instructed by the very individuals whose conduct is impeached, the maxim *omnia presumuntur contra spoliatorem* ought to be applied. The Lord Chancellor has already read the terms of the resolution passed by the company on the 8th July, 1914, and I agree that this resolution cannot be interpreted as anything but a complete adoption of Llewellyn's conduct. The evidence before us satisfies me that we are faced with a course of crime and fraud; we have a majority of the shareholders endorsing the action of those who were guilty of this crime and fraud, and passing a resolution of confidence in Llewellyn. I asked the Solicitor-General whether from the beginning to the end of the evidence there was to be found a trace of disapproval of the conduct of Llewellyn and his co-directors, or any suggestion that this fraudulent course of dealing would not be continued in the future, but he could point to none.

In these circumstances it would be to me a matter of profound regret that the Court should find itself unable to make an order for the winding up of the company; but a careful examination of the authorities which have been cited has led me to the conclusion that the Court has ample jurisdiction to make an order for winding up. I think that the facts of the case, which show that a majority of the shareholders, consisting of practically two families, are endeavouring, at the expense of the minority, to shield a criminal who has stolen the moneys of the company, are stronger than those in any of these cases where an order has been made. The appeal must be dismissed with costs.

Molony L.J. concurred.

Solicitors for the appellants: *Thomas Gerrard & Co.*

Solicitors for the respondents: *G. D. Fottrell & Sons.*

R. ST. J. C.

M'ELLISTRIM *v.* THE BALLYMACELLIGOTT CO-OPERATIVE AGRICULTURAL AND DAIRY SOCIETY, LIMITED (1).

Appeal. 1916. April 4. Dec. 11.

Industrial and Provident Society—Disputes between Society and Members—Rules—Arbitration—Rules alleged to be ultra vires—Stay of Proceedings—Industrial and Provident Societies Act, 1893 (56 & 57 *Vict. c.* 39), *s.* 49.

The rules of an industrial and provident society provided for the reference of all disputes between the society and its members to the Irish Agricultural Organization Society.

A member of the society commenced an action against the society for a declaration that certain new rules adopted by the society were ultra vires the society, and not binding upon him, and for consequential relief.

Held, that the plaintiff's claim was not a dispute within the arbitration rule and s. 49 of the Industrial and Provident Societies Act, 1893, and that the defendant society's motion to stay proceedings in the action ought accordingly to be refused.

This was an appeal from an order, dated the 29th February, 1916, of Pim J. (sitting for Barton J.), refusing the defendants' motion for an order staying all further proceedings in the action.

The action was brought by the plaintiff claiming a declaration that certain rules adopted by the defendant society in the year 1915, and registered by the Registrar of Friendly Societies on the 1st February, 1916, were not binding on the plaintiff and the other members of the society, as being improperly adopted to the prejudice of the plaintiff and other members, illegal as in unreasonable restraint of trade, and ultra vires the society. The plaintiff also claimed an injunction to restrain the society from acting upon or putting in force the said rules.

The society was registered under the Industrial and Provident Society's Act, 1893, on the 6th March, 1903, and the plaintiff, who was the owner of a large farm, and of a number of milch cattle at Ballydwyer, Ballymacelligott, became a member of the

(1) In the Court of Appeal, before SIR IGNATIUS J. O'BRIEN L.C., and RONAN and MOLONY L.JJ.

Appeal. 1916.

M'ELLISTRIM v. BALLYMACELLIGOTT CO-OPERATIVE SOCIETY.

society under the rules adopted and registered in 1903. Rule 20 of these rules provided: "Any member who shall supply milk to any creamery, other than that owned by the society, for the space of three years from the date of his admission to membership, without the consent in writing of the committee, shall forfeit his share, together with all money credited therein."

On the 29th November, 1915, notices were sent out on behalf of the society to each member of a special general meeting to amend the rules of 1903, and to adopt certain new rules; and at the meeting held on the 17th December, 1915, a resolution to adopt these new rules was carried by a show of hands, a poll being, as the plaintiff alleged, refused. These rules were not registered by the Registrar of Friendly Societies. A further meeting of the society was summoned, and held on the 18th January, 1916, when a resolution adopting the new rules was again carried, and these rules were subsequently registered. The plaintiff, as he alleged, attended both meetings of the society, and protested against the change of rules.

Rule 5 of the new rules, so far as material, provided that—

"The society shall consist of the special members, and of all such persons resident in or occupying or grazing lands in the townlands of Ballydwyer, Ballymacelligott (and other townlands), and of the members of such other societies registered under the Act, wherever situated, as the committee of management may admit to membership."

Rule 6 (2) of the new rules provided that—

"After the society shall have started a creamery for its members, no individual member of the society, so long as he continues a member thereof, who shall have milk to sell, the produce of a cow or cows kept or grazed on lands within the area defined in rule 5, shall, without the written consent of the committee first obtained, sell any such milk to any creamery other than a creamery of the society, or to any company, society, person or persons who sell milk or manufacture butter for sale. Any member of the society committing a breach of this rule shall pay to the society, as and for liquidated damages, and not by way of penalty, the sum of one shilling per cow per day for every cow's milk sold contrary hereto."

Rule 16 of the new rules provided that—

"Any member, all of whose shares shall have been transferred or cancelled, shall thereupon cease to be a member of the society. A member shall not otherwise be entitled to withdraw from the society."

By further rules it was provided that no member should withdraw from the society, or assign his shares, except by leave of the committee, and also that all disputes between members and the society were to be referred to the Irish Agricultural Organization Society.

An affidavit was filed by the secretary of the defendant society in support of the motion to restrain the action, in which he averred that the society was always ready and willing to join and concur in all necessary and proper acts for causing the matters in dispute to be decided by arbitration in accordance with the rules. In an answering affidavit filed on behalf of the plaintiff, it was alleged that the defendant society contributed to the funds of the Irish Agricultural Organization Society by payment of affiliation fees and fees to butter instructors; that the said Organization Society levied contributions on the annual turn-over of the defendant society at the rate of 10*s.* per £1000, and had a pecuniary interest in the funds and business of the defendant society, and in particular in preventing members from withdrawing from the defendant society.

At the date of the hearing of the motion to stay proceedings before Pim J., no statement of claim had been delivered. The writ of summons in the action having sought a declaration that the rules of the society as a whole were not binding on the plaintiff, the learned judge refused the motion on the ground that the action could not be sent to arbitration under a rule the validity of which was itself challenged in the action. Hence this appeal. In the statement of claim which was subsequently delivered, the plaintiff impeached only the three rules above set out.

Conner K.C. and *Carrigan K.C.* (with them *D. B. Sullivan*), for the appellants:—

The action should be stayed, and the matter in dispute referred to arbitration. The acknowledgment of registry is conclusive evidence that the rules were duly registered. Section 10, sub-s. 3,

Appeal. 1916.

M'ELLISTRIM *v.* BALLYMACELLIGOTT CO-OPERATIVE SOCIETY.

of the Industrial and Provident Societies Act, 1893: *Butler* v. *Springmount Co-Operative Dairy Society* (1); *Rosenburg* v. *Northumberland Building Society* (2); *Dewhurst and Others* v. *Clarkson* (3). All the members are bound by the new rules. Section 22 of the Industrial and Provident Society Act, 1893; *Smith* v. *Galloway* (4). The validity of the rules themselves, and not any act done under the rules, is challenged. It is a dispute between the society and its members, and comes within the arbitration rule: *Trott* v. *Hughes* (5); *Stone* v. *Liverpool Marine Society* (6); *Cox* v. *Hutchinson* (7). Section 49, sub-s. 1, of the Industrial and Provident Society Act, 1893, is mandatory: *M'Caffrey* v. *M'Mahon* (8). Counsel also cited *Reeves* v. *White* (9); *Acklacca Co-Operative Creameries, Ltd.* v. *Lynch* (10); *Crisp* v. *Bunbury* (11); *Mulkern* v. *Lord* (12); *Municipal Permanent Investment Building Society* v. *Kent* (13) (judgment of Lord Blackburn, 274); *North-Western Salt Co., Ltd.* v. *Electrolytic Alkali Co., Ltd.* (14).

Conner K.C., in reply, referred to *Wilkinson and Others* v. *Jagger and Others* (15); *Rex* (*M'Aneny*) v. *County Court Judge of Tyrone* (16).

S. L. Brown K.C. and *Clery* (with them *Serjeant Sullivan*):—

The arbitration rule does not apply to this case. It is not a dispute under the rules. Here the rules themselves are attacked: *Kitts* v. *Moore* (17); *Andrews* v. *Mitchell* (18); *Palliser* v. *Dale* (19); *M'Gowain* v. *City of Glasgow Friendly Society* (20). A clause in an agreement to refer disputes thereunder to arbitration cannot be set up in answer to an action in which the validity of the agreement is questioned, inasmuch as the action strikes at the root of the agreement: *Mylne* v. *Dickinson* (21), a decision of

(1) [1906] 2 I. R. 193.
(2) 22 Q. B. D. 373.
(3) 3 Ellis & Blackburn, 194.
(4) [1898] 1 Q. B. D. 71.
(5) 16 L. T. 260.
(6) 63 L. J. (Q. B.) 471.
(7) [1910] 1 Ch. 513.
(8) 35 I. L. T. R. 97.
(9) 17 Q. B. 995.
(10) [1915] I. L. T. R. 233.
(11) 8 Bing. 394.
(12) 4 A. C. 182.
(13) 9 A. C. 260.
(14) [1914] A. C. 461.
(15) 20 Q. B. D. 423.
(16) 44 I. L. T. R. 147.
(17) [1895] 1 Q. B. 253.
(18) [1905] A. C. 78.
(19) [1897] 1 Q. B. 257.
(20) [1913] Sc. 991.
(21) G. Coop. 195.

Lord Eldon. *Cox* v. *Hutchinson* (1) was a case in which the act done, *i.e.*, the passing of the resolution, was alleged to be ultra vires, not the rule itself under which it was proposed to arbitrate. The Irish Agricultural Organization Society were the moving party in forcing upon the plaintiff these rules, by which they are made the arbitrator in a dispute in which they have a direct pecuniary interest. A decrease in the membership of a society affects their funds adversely.

SIR I. J. O'BRIEN L.C.:—

This is an appeal from an order of Mr. Justice Pim, refusing a motion of the appellants asking that all further proceedings in the action be stayed, on the ground that the dispute between the plaintiff and the defendants is one which under the rules of the defendant society must be referred to arbitration. In the result, I am of opinion that the order of Mr. Justice Pim was correct, but I give my own reasons, because I do not adopt those which influenced him as I understand them, in the decision at which he arrived. The judgment was given on a contention that the whole body of rules was impeached, but before us the question has been limited to a few specified rules.

The plaintiff had been a member of the society under rules which had been duly approved and registered on the 6th March, 1903. Speaking generally, the object of the society was, that the members, who were to be for the most part farmers, should supply the milk produced on their farms to the Creamery Society, in which they became members by holding shares, while the Creamery Society was supposed to deal for milk with these farmers exclusively. Such an association, whether it took the form of an ordinary partnership or was carried out under the rules of the Industrial and Provident Societies Act, is, of course, in itself a perfectly legitimate one. But the case of the *Tipperary Creamery Society* v. *Hanley* (2) shows that great care has to be exercised in the framing of the rules, lest there should be any transgression of the law with regard to illegal restraint of trade.

Rule 20 of the rules under which the plaintiff became a member provides that any member who shall supply milk to any

(1) [1910] 1 Ch. 513. (2) [1912] 2 Ir. 586.

Appeal. 1916.

M'ELLISTRIM v. BALLYMACELLIGOTT CO-OPERATIVE SOCIETY.

Sir Ignatius J. O'Brien L.C.

creamery other than that owned by the society for the space of three years from the date of his admission to membership, without the consent in writing of the committee, shall forfeit his shares, together with all money credited thereon; and by rule 19 of the general rules, a person whose shares have been forfeited under the rules ceases to be a member of the society. I do not think it necessary to consider whether or not these two rules fall within the strictures of the Court of Appeal on the grounds of extent of area, but apart from that, speaking generally, and in respect of the question arising in the present case, they were, to my mind, reasonable, both to the creamery society and to the plaintiff, by reason of the fact that there is no general prohibition for the whole term of the member's life to sell milk to anyone. If he violates the terms of the rule for the space of three years, he may cease to be a member of the society, and forfeits his shares, a penalty not by any means unreasonable, as it seems to me; but from that time onwards, although he has lost his shares, he is again a free man with regard to the carrying on of his trade or business, supplying milk to any creamery or person anywhere, or at any price that he chooses. It may be that if he found the conditions of the rule irksome or unprofitable he might be willing to forfeit his shares, and so be quite untrammelled in the carrying on of his business. The arrangement gave him this valuable right.

Power is contained in the rules to rescind or alter any rules by the proper majority, and it appears that on the 10th January, 1916, following abortive proceedings for the same purpose, a general meeting of the defendant society was summoned for the 18th January, for the purpose of adopting certain amendments of the rules of 1903. The plaintiff and other members of the society protested against the making of these amendments, but they were carried by the necessary majority, and the rules, as amended, were duly registered. Rule 20, to which I have referred, was deleted, and, among other rules, a new rule 6 (2) was enacted. This provided that after the society shall have started a creamery "no individual member of the society, so long as he continues a member thereof, who shall have milk to sell, the produce of a cow or cows kept or grazed on lands

within the area defined in rule 5, shall, without the written consent of the committee first obtained, sell any such milk to any creamery other than the creamery of the society, or to any company, society, person or persons who sell milk or manufacture butter for sale. Any member of the society committing a breach of this rule shall pay to the society as and for liquidated damages, and not by way of penalty, the sum of one shilling per cow per day for every cow's milk sold contrary hereto."

No doubt there is also provided by the new rules a penalty, described as liquidated damages, on the society if they should not take delivery of milk from a member, and they are bound also not to receive milk supplies from any area outside certain townlands mentioned in the rules. But, amongst other matters, the plaintiff contends that it was ultra vires and contrary to natural justice for the society to make this alteration in the rules by which the members, who previously were not bound down within very strict limits as to the supply of milk to other persons or creameries than the defendant society, became now bound, so long as they held shares in the society, under a very serious penalty not to sell their milk to any creamery other than the creamery of the society. Of course the objections which existed in the Tipperary case were at any rate largely eliminated, and the restriction is not as large as in that case was held to amount to illegality, but so far as the members of the society are concerned, from the point of view of their position with regard to dealing with their milk and selling it, a change of a very far-reaching and serious character was made. An additional objection was made that the rules referred all disputes between members and the society to the committee of the Irish Agricultural Organization Society, which, it is alleged, devised these rules, and there is no doubt that they follow a certain stereotyped form of the general organization, and that a member of that organization was present when the resolutions altering the rules were carried. Accordingly it is argued that to stay the action for the purpose of submitting a question such as this to what may be a not impartial tribunal is not reasonable. It is further contended, apart from the question of the alleged unfairness of the alteration, that the new rule is ultra vires, because it binds a member for his life, and that rule 16

Appeal. 1916.

M'ELLISTRIM v. BALLYMACELLIGOTT CO-OPERATIVE SOCIETY.

Sir Ignatius J. O'Brien L.C.

prohibits any member from withdrawing from the society except where cases of transfer or cancellation cause him to cease to be a member of the society.

It has to be admitted, and of course it could not be disputed, having regard to the decision of this Court in *Butler* v. *Springmount Co-operative Agricultural and Dairy Society* (1), that for some purposes, at any rate, the acknowledgment of registration of the rules by the Registrar is conclusive as to the validity of the amendment, but it is contended that this applies to matters of procedure only, and does not preclude the question of the rules being in themselves ultra vires. To this view I assent. The acknowledgment of registration cannot have the effect of making legal a matter which otherwise would have been inherently illegal.

The appellants also say that the questions which are raised by the plaintiff are really what has been described as "domestic questions," arising between him and the society, and that as such they must be referred to the arbitration of the body designated in the rules to act as arbitrators in the event of disputes. They rely on *Catt* v. *Wood* (2) in the Court of Appeal and the House of Lords, and they also rely strongly on *Stone* v. *Liverpool Marine Society* (3) and the case of *Cox* v. *Hutchinson* (4) following it. *Cox* v. *Hutchinson* (4) is at first sight apparently a very strong decision in favour of the defendants. In that case a member of the society commenced an action against the committee of management of the society for a declaration that resolutions passed by them were ultra vires. The headnote of the case states that "where the rules of a registered society contain a provision for a reference of disputes between a member of the society and its officers to arbitration, it is not an answer to an application for a stay of proceedings, that the question at issue is, whether or not the act complained of is ultra vires." Warrington J., in giving judgment, says, at page 517:—"It is said on behalf of the plaintiff that, because the question raised by the action is whether or not certain acts of the society are ultra vires the society, the dispute is not a dispute

(1) [1906] 2 I. R. 193, 200.
(2) [1910] A. C. 404.
(3) 63 L. J. Q. B. 471.
(4) [1910 1 Ch. 513.

between a member and the society within the meaning of the section. The ground of the plaintiff's action must be that he is injured by the acts in question in his capacity as a member of the society. Therefore, the dispute is between a member in his capacity of member, and the society or an officer thereof."

While this case was at argument it appeared to me that the statement of the law in that case, in so far as it was sought to apply it to the present case, goes too far. It seems to me that if the question be whether or not a certain rule with regard to general principles of law is invalid, it would be very extraordinary that the jurisdiction of the Courts could be ousted by any rule which compulsorily referred this general question to the society, for that body might itself have brought about alteration in the rule which rendered it illegal and ultra vires. In other words, that if it is a question whether, under cover of a power to alter rules, there was a complete invasion of the plaintiff's rights under some of those rules, this question must be one to be determined by the Courts, especially having regard to the fact that the extent of the jurisdiction given to societies such as this depends upon statute, and that the power of the society under the statute must be a matter for the Courts, and not for the society itself, to determine.

Since the case was at hearing we have all had an opportunity of reading the case of *Heard* v. *Pickthorne* (1). The plaintiff there was a member of a society which refused sickness benefit on the ground that the member had sent in a certificate from the doctor who had in fact attended him in his illness, but who was not a panel doctor, and that he had not sent in a certificate from a panel doctor. He sued the society, claiming a declaration that the resolution of the society under which the refusal was justified was illegal and ultra vires, and it was held that this dispute was not a matter of domestic administration which, under the National Insurance Act, 1911, ought to go to arbitration. The reasons given by the members of the Court of Appeal appear to me to be applicable to the present case, which, if anything, is a stronger

(1) [1913] 3 K. B. D. 299.

Appeal. 1916.

M'ELLISTRIM v. BALLYMACELLIGOTT CO-OPERATIVE SOCIETY.

Sir Ignatius J. O'Brien L.C.

one than *Heard* v. *Pickthorne* (1). At page 308 Vaughan Williams L.J. puts it:—"It is plain on the authorities that, although there are many cases which must go to arbitration, there are cases in which the real question is whether or not the society are doing or trying to do something which is ultra vires, and which ought not to be tried by the society, but ought to go into Court." Hamilton L.J., at page 312, deals with *Stone* v. *Liverpool Marine Society* (2), *Catt* v. *Wood* (3), and *Cox* v. *Hutchinson* (4), in these words:—"As I said, all the cases in question are cases where, to use the language of Warrington J. in the last-named case, 'The question is whether certain acts of the committee purporting to bind the society were or were not within the powers of the society. That depends upon the construction of the constituent documents of the society, that is, the rules and the Act under which the society is registered. But a dispute relating to the rules appears to be exactly within the purview of sect. 49.' This is not a dispute relating to the rules. In fact, it is urged upon us that the resolution impugned is not a rule. This is a dispute with reference to the Act, and with reference to general principles of law, as to whether a resolution, which has been put in force, is not, in truth, of no force, but entirely invalid. Therefore, I am of opinion that those cases do not assist us." At page 309 he says:—"Whether it be called a rule or a regulation, its effect is that it operates, and operates immediately, to prejudice him in certain rights which the statute has given him."

This case seems to support the view which I entertain. I think that the society has in the new rules attempted to affect rights which the general law gives the plaintiff and other members—namely, that his or their position should not be altered in a way forbidden by natural justice.

It may be that when the case is heard the plaintiff may prove not to be right, but I conceive that there is prima facie sufficient foundation for it to entitle him to have his rights determined by the Courts, and not by arbitration.

(1) [1913] 3 K. B. D. 299.
(2) 63 L. J. Q. B. 471.
(3) [1910] A. C. 404.
(4) [1910] 1 Ch. 513.

As to the contention based on the unreasonableness of the arbitration rule itself—by reason of its referring disputes to the Irish Agricultural Organization Society, who devised the rules—it is enough to say that I incline to the plaintiff's view, but I fear that the cases decided on building contracts, *e.g.*, *Jackson* v. *Barry Railway Co.* (1), are very much against the plaintiff. If, however, the plaintiff is allowed to proceed, this question will arise for decision, when I shall consider myself free to form a definite opinion.

With regard to the other question raised, I now say nothing. In the judgment which I shall give in the case which follows the present (2), I express views which would be against the plaintiff's contention, but he cannot be prevented from raising these or any other questions open in an action, so that if it need be he may have in the end a decision of the highest appellate tribunal.

Whether or not plaintiff's statement of claim (which was delivered after the motion to stay) sufficiently covers all the matters that were dealt with in the argument at the Bar will be a matter for the plaintiff's counsel. It may require some amendment.

RONAN L.J.:—

If an action is brought to have it declared that an entire instrument is void on any ground, and one of the clauses of this instrument is an arbitration clause for the settlement of disputes arising out of or in respect of the instrument, it is obvious that it would be absurd to stay the action on the ground that the question of the validity of the instrument should be determined under the arbitration clause. If the whole instrument is void, the arbitration clause is equally void, and to stay the action on this ground would be to decide that the arbitration clause was valid and binding. The claim in the writ of summons in the present action is "for a declaration that the new rules of the 1st February, 1916, are not binding on the plaintiff" on the grounds mentioned. This, of course, meant the entire body of the rules, including the

(1) [1893] 1 Ch. 238. (2) *Coolmoyne Co-operative Creamery* v. *Bulfin*, [1917] 2 I. R., p. 107.

Appeal. 1916. M'ELLISTRIM v. BALLYMACELLIGOTT CO-OPERATIVE SOCIETY. Ronan L.J.

arbitration clause. As Pim J. says in his judgment, "It is an attack on the rules as a whole as being ultra vires, and it would be absurd to send to arbitration the facts as to whether the very rule which authorizes arbitration was existent or non-existent."

On this very intelligible ground he refused the motion.

He dealt with the case as if it had been an ordinary motion to stay proceedings under the Common Law Procedure Act in order that the matter might be referred to arbitration under the clause in the instrument impeached. He did not refer in his judgment to any statutory provision, and no question of jurisdiction appears to have been raised before him. However, since his decision the statement of claim has been delivered, and has entirely changed the aspect of the case.

It appears from it that so far from the entire rules being challenged, only three are challenged—Nos. 5, 6 (2), and 8. Of these only 6 (2) is really challenged. Nos. 5 and 8 are only mentioned as affecting the operation of No. 6 (2). There is no suggestion that in themselves they are not perfectly valid. Accordingly, Mr. Brown, counsel for the plaintiff, with his usual accuracy, has defined the only question in the case as being "whether the dispute as to the validity of rule 6 (2) (including the effect given to it by other rules) is a dispute within the meaning of Rule 69 of the society's rules—the arbitration clause?" He does not dispute the validity of Rule 69, but says the dispute in this case is not a dispute within the meaning of the clause; he does not raise any question in respect of the matters stated in paragraphs 4 and 5 of the statement of claim, and he admits that the registration of the 1st February is final and conclusive. He only impeaches rule 6 (2), as I have explained.

The question in this action is, therefore, identical with that in the *Coolmoyne Case* (1); but if decided the same way in the present action, the case could be taken to the House of Lords. This course is not open in the *Coolmoyne Case* (1), that being a case stated on a civil-bill appeal.

The rules in this case, so far as the questions which arise, are practically identical with those in the *Coolmoyne Case* (1). The only

(1) [1917] 2 I. R., p. 107.

difference is that there is in this case an express rule that "a member shall not otherwise be entitled to withdraw." We have come to the conclusion in the other case that this difference is immaterial. No question of jurisdiction arose there, for the reasons we are about to state in our judgment in that case.

The present case, in my opinion, depends on whether the jurisdiction of the High Court to try this case is excluded by sect. 49 of the Industrial and Provident Societies Act of 1893. The Act provides that "Every dispute between a member . . . and the society, or an officer thereof, *shall* be decided in manner directed by the rules of the society, if they contain any such direction." Sect. 69 of the Rules says:—"Any dispute arising between the society and its members . . . shall be submitted to arbitration," &c. These rules are made under the provisions of the Act of 1893.

In 1884, in *Blashill* v. *Chambers* (1), Grove J. said:—"Prima facie, I should say that the proper mode of construction is to apply the same interpretation to terms used in a by-law which is applied to the same terms in the Act under the powers of which the by-law is framed." Sect. 31 of the Interpretation Act, 1889, is mandatory, and applies, inter alia, to "rules" as one of the instruments dealt with. It says:—"Expressions used in the instrument, if it is made after the commencement of this Act, *shall*, unless the contrary intention appears, have the same respective meanings as in the Act."

I can find no contrary intention in the rules. I am of opinion that in the circumstances any dispute arising "between the society and its members" in the rules, means the same thing as "every dispute between a member . . . and the society" in the Act, and that therefore the rules do "contain the direction" referred to in the Act. If then the question in this action is a dispute between a member and the society, within the meaning of the section, the High Court has no jurisdiction in the matter.

In the present case it is clear that the plaintiff does not dispute that he is a member or seek to be discharged from his membership. His claim is that this particular rule shall be declared not

(1) 14 Q. B. D., at p. 485.

Appeal. 1916.

M'ELLISTRIM v. BALLYMACELLIGOTT CO-OPERATIVE SOCIETY.

Ronan L.J.

binding on him. He claims this declaration as a member. Apart from his membership he could not claim it.

The question in the case, therefore, reduces itself to this: Is a dispute between a member, as a member, and the society, as to the validity of a rule or rules "a dispute between a member and the society" within the meaning of sect. 49 of the Act?

It is a question of the *effect*, not of the construction, of the rule. If on its true construction the rule is illegal, it is of no effect. "The rules form the contract between the society and the members, and that contract can only be altered in the mode prescribed by the Act of Parliament"—*Auld* v. *Glasgow Working Men's Building Society* (1). If this particular clause is illegal, it is, therefore, not binding on the parties, and of no effect. It is ultra vires, because the society has no power to make an illegal rule. But the concrete and only question in this case is, Is this the rule avoided by the general law as being in restraint of trade? Is that a "dispute" within the meaning of the Act?

I turn to sect. 49 of the Act. The sub-title "Disputes" would seem to show that it was intended to provide for all disputes.

Sub-s. 1 says "Every dispute between a member . . . and the society, or an officer thereof, shall be decided in manner directed by the rules of the society, if they contain any such direction, and the decision so made shall be binding and conclusive on all parties without appeal, and shall not be removable into any court of law, or restrainable by injunction; and application for the enforcement thereof may be made to the county court." Sub-s. 2 gives an alternative to the parties to refer the dispute to the Registrar. Sub-s. 3 gives the Registrar wide jurisdiction as to evidence and documents. Sub-s. 4 provides that where rules direct a reference to justices the dispute shall be determined by a court of summary jurisdiction, and the parties are empowered to substitute the county court. Sub-s. 5 provides that where the rules contain no direction as to disputes, or where no decision is made on a dispute, after forty days the person aggrieved may apply either to the county court or to a court of summary jurisdiction, which may hear and determine the dispute.

We have here jurisdiction given to several tribunals to deal

(1) 12 A. C., at p. 205.

with every dispute, viz., (*a*) the tribunal named in the rules if any (in the present case arbitration); (*b*) the Registrar; (*c*) the court of summary jurisdiction; (*d*) the county court.

The subject-matter of the jurisdiction of each and all is the same, "Every dispute." Any particular dispute therefore is within the jurisdiction of all or none.

It is obvious that the rules may prescribe either arbitration, the registrar, the court of summary jurisdiction, or the county court as the mode of decision of disputes, and then these last-named tribunals will have the same jurisdiction in such a case as they would have had in cases where their jurisdiction arose, though they were not the tribunal prescribed by the rules. This demonstrates that the arbitrators mentioned in the rules have the same jurisdiction to decide disputes as the county court.

So far no jurisdiction is given to the supreme court, and no provision is made for the decision of difficult questions of law. Sub-sect. (6) deals with this, and provides: "Notwithstanding anything contained in the Arbitration Act, 1889, 'the court' [this would include the county court and the court of summary jurisdiction] and the chief or other registrar shall not be compelled to state a special case on any question of law arising in the case, but the court or chief or other registrar may, at the request of either party, state a case for the opinion in England or Ireland of the Supreme Court of Judicature."

The English Arbitration Act clearly applies to arbitrations such as this: *Tabernacle Permanent Building Society* v. *Knight* (1). It is unnecessary to consider whether the Irish Common Law Procedure Act applies for the purposes of the present case, as "every dispute" in the Act must mean the same thing in England and in Ireland.

The Act enables the society to select any of these various tribunals for the decision of disputes. Some are lay, some legal. The decisions on points of law of some may, of others must, if the party desires it, come before the High Court. The wide choice given to the parties making the rules seems to me to indicate that it is left to them to determine whether they will have recourse to rough and ready and final decisions on facts and law

(1) [1892] A. C. 298.

Appeal. 1916.

M'Ellistrim v. Ballymac-elligott Co-operative Society.

Ronan L.J.

by a tribunal of their own creation, or resort to one or other of the various jurisdictions in the section. I think that it was plainly intended to apply to all disputes that were likely to arise between the society and its members.

The society is not bound to make any rules for the settlement of disputes (see the Act, s. 10). If the society made no rules on this subject, the member or person aggrieved may go to the justices or the county court to settle the dispute (sect. 49, sub-s. 5). Is it possible that it was intended that if the society sues a member in the county court for money payable under a rule, the question of the validity of the rule can be determined, but that if the member sues the society for money under the same rule it cannot?

Whether we call it ultra vires, or illegality, or opposed to public policy, the question is the same—a question of the validity or invalidity of the rule—of its force or want of force.

These words, "Every dispute between a member and the society shall be decided in manner directed by the rules," are common to building societies, friendly societies, and industrial societies, &c. Many cases have been decided on their meaning in many statutes.

It was settled at an early date that these words in the statute only extended to "disputes between the society and a person in his capacity as a member." I shall now read a long passage from the judgment of Stirling J. in *Municipal Building Society* v. *Richards* (1), giving a history of the decisions on this subject.

[Here the Lord Justice read from the words "the course of legislation," on p. 378, to the words "he himself should put upon them," on p. 383.]

This appears to me to show—1, that Lord Selborne's opinion was that the words under the rules applied to all "disputes between members" (in that character), in respect of their rights and liabilities as such, and the society; 2, that the Act of 1884 (47 & 48 Vict. c. 41), sect. 2, was passed to give effect to that opinion; 3, that the terms of that section, "The word 'disputes' in the Building Societies Acts, or in the rules of any society thereunder, shall be deemed to refer *only* to disputes between the society and a member in his capacity of a member," and in the absence of

(1) 39 Ch. D. 372.

an express provision "shall not apply to any dispute between any such society and any member thereof, or any other person whatever as to the *construction or effect* of any mortgage-deed or any contract contained in any document *other than the rules* of the society," are in substance a statutory recognition of the principle that these words do include disputes between the society and a member as such, both as to the construction and as to the effect of the rules, and therefore as to their validity.

After the argument in this case, I found the case of *Heard* v. *Pickthorne* (1). But for that case, I should have thought the authorities conclusive in favour of the appellants. As to *Andrews* v. *Mitchell* (2), I think the true explanation of that case is given by Lord Loreburn in *Catt* v. *Wood* (3), by Warrington J. in *Cox* v. *Hutchinson* (4), and by the Court in *Wayman* v. *Perseverance Lodge* (5). I do not think the House of Lords were dealing with the construction of the section corresponding to sect. 49 in the present case.

In *Smith* v. *Galloway* (6) the dispute was as to whether a rule was ultra vires; the arbitrator under the Act stated a case, and the Court decided it. The whole proceeding would have been void if it was not a dispute within the Act. It seems to me a very grave matter to decide that when a dispute involves a question of the validity of a rule in building, friendly, or industrial societies, the High Court has exclusive jurisdiction in the matter, and that sect. 49 and the corresponding enactments in the statutes relating to building and friendly societies are confined to questions of the construction as distinguished from the validity of the rules.

This seems to me to be the tendency, if not the effect, of some of the dicta in *Heard* v. *Pickthorne* (1): see judgment of Hamilton L.J. at pp. 312, 313. It is true that he says at p. 312, "This is not a dispute relating to the rules"; but I agree with my colleagues that the general effect of the dicta in that case is that a dispute as to whether a rule is void as being ultra vires is not a dispute within the meaning of an enactment similar to, but by no means identical with, sect. 49 in this case, or with the corresponding enactments in the Building and Friendly Societies Acts.

(1) [1913] 3 K. B. 299.
(2) [1905] A. C. 78.
(3) [1910] A. C., at p. 406.
(4) [1910] 1 Ch. 513.
(5) W. N. 1916, at p. 407.
(6) [1898] 1 Q. B. 71.

Appeal. 1916. M'ELLISTRIM v. BALLYMACELLIGOTT CO-OPERATIVE SOCIETY. Ronan L.J.

Vaughan Williams L.J. and Bray J. do not refer to any of the authorities. Hamilton L.J. refers to *Cox* v. *Hutchinson* (1), which was a decision on the very section we are dealing with, and to *Stone* v. *Liverpool Marine Society* (2), which was decided on sect. 22 of the Friendly Societies Act, 1875, which is identical with the section in this case.

Does he overrule these cases, or suggest that they were wrongly decided? So far from it, he disposes of them by saying—"Those cases do not assist us or assist the respondents in this case." (In my opinion, unless they are overruled by *Heard* v. *Pickthorne* (3), they are conclusive in favour of the appellants in this case.)

What did they decide? *Cox* v. *Hutchinson* (1) was an action for a declaration that certain resolutions passed by the committee were ultra vires *the society*. The case came before the Court on a motion to stay, similar to the present motion. The defendants relied on the judgment of Lord Selborne in *Kent's Case* (4), and on *Stone's Case* (2). The plaintiff's counsel submitted that the rules are confined to matters which are intra vires the society. In giving judgment, Warrington J. said (5):—"It is said on behalf of the plaintiff that, because the question raised by the action is whether or not certain acts of the society are ultra vires the society, the dispute is not a dispute between a member and the society within the meaning of the section. The ground of the plaintiff's action must be that he is injured by the acts in question in his capacity as a member of the society. Therefore the dispute is between a member in his capacity of member and the society or an officer thereof. It may be that if a dispute arose between the society and some person not affecting that person's capacity as a member, the case would be different. But here the subject-matter of the dispute affects the plaintiff in his capacity of member. The question is whether certain acts of the committee purporting to bind the society were or were not within the powers of the society. That depends upon the construction of the constituent documents of the society, that is, the rules and the Acts under which the society is registered. But a

(1) [1910] 1 Ch. 513.
(2) 63 L. J. Q. B. 471.
(4) 9 A. C. 260.
(5) [1910] 1 Ch. 517, 518.

dispute relating to the rules appears to be exactly within the purview of sect. 49. Therefore, independently of authority, I should think that this was a 'dispute' within the meaning of the section. But, further, I think the case is covered by the authority of *Stone* v. *Liverpool Marine Society* (1). Two disputes arose in that case; one was whether the second wife of an enrolled member was entitled to enrolment and the benefits of the society, and the other was whether the society was entitled to dispose of its funds otherwise than for the benefit of its members. The matter came before a Divisional Court consisting of Mathew and Collins JJ.; and Mathew J., who delivered the judgment of the Court, held, with regard to both disputes, that they came within the society's rule as to arbitration and the provisions of sect. 22 of the Friendly Societies Act, 1875, which correspond practically verbatim with those of sect. 49 of the Industrial and Provident Societies Act, 1893. With regard to the second ground of dispute in that case, which more nearly than the other corresponds with the dispute in the present case, Mathew J. says: 'In the second place, and on the second branch, we are asked for an injunction upon the ground that there is evidence that the committee are about to misappropriate the society's funds,' that is, to deal with them in a way outside the powers of the society. He goes on to state that the plaintiffs had failed to show that there was evidence to convince the Court that their rights were likely to be infringed. 'But,' he adds, 'it must be borne in mind that sect. 22 also applies to this branch of the claim, and that any award made upon it can be readily enforced by the County Court.' He therefore held, as to the second branch of the dispute, that although the dispute was whether the act in question was ultra vires or not, yet it fell within sect. 22 of the Friendly Societies Act, 1875, which, as I have already said, is really exactly the same as sect. 49 of the Industrial and Provident Societies Act, 1893, which applies in the present case. The plaintiffs appealed, but the Court of Appeal (consisting of Lord Esher M.R., Lopes L.J., and Davy L.J.) dismissed the appeal, saying that they agreed entirely with the grounds upon which the Divisional Court put their judgment. That case seems to me to be a distinct authority that it is no

(1) 63 L. J. Q. B., 471, 473.

Appeal. 1916.

M'ELLISTRIM v. BALLYMACELLIGOTT CO-OPERATIVE SOCIETY.

Ronan L.J.

answer to an application for a stay of proceedings to say that the question at issue is whether or not the act complained of is ultra vires."

The dispute in this case is whether on the true construction of the Act the rule is ultra vires; the Act is certainly one of "the constituent documents of the society."

It is difficult, if not impossible, to reconcile some of the dicta in *Heard* v. *Pickthorne* (1) with the grounds of the decision in *Stone's Case* (2) and *Cox* v. *Hutchinson* (3); but I cannot find any statement in any of the judgments in *Heard* v. *Pickthorne* (1) suggesting that these cases should be overruled. Unless they are, in my opinion they govern the present case, and are in accordance with the principle reaffirmed in *Winter* v. *Wilkinson* (4), "that the dispute . . . must be between the society and a person in his capacity as a member." As the Court say in that case, "The language of sect. 68 (corresponding to sect. 49 here) is very wide," and this is the limitation put on it.

Stone's Case (2), as pointed out, was an express decision that a dispute as to whether the act in question was ultra vires, was a dispute within sect. 22 of the Friendly Societies Act, 1875 (identical with the present section). It had the authority of the five judges mentioned. It has never been questioned; but this is not all. It was decided in 1894. In 1895, in sect. 10 of the Friendly Societies Act of that year, the Legislature had sect. 22 under consideration and amended it in some respects, but left unaltered the portion on which *Stone's Case* (2) had been decided.

In 1896 by the Act of that year (59 & 60 Vict. c. 25) the Act of 1875 was repealed; but sect. 68 of the Act of 1896 was a re-enactment of sect. 22 of the Act of 1875 (38 & 39 Vict. c. 60), with some immaterial alterations. In 1908, by sect. 6 of the Act of that year (8 Ed. 7, c. 32), the Legislature made an amendment as to the meaning of "dispute" in sect. 68 of the Act of 1896, which does not affect this case, but made no change in the words on which *Stone's Case* (2) was decided.

"There is a well-known principle of construction sanctioned, if sanction were necessary, by the decision of the Court of Appeal

(1) [1913] 3 K. B. 299.
(2) 63 L. J. Q. B. 471.
(3) [1910] 1 Ch. 513.
(4) [1915] 1 Ch. 317, at p. 323.

in *Greaves* v. *Tofield* (1), that where the Legislature uses in an Act a legal term which has received judicial interpretation, it must be assumed that the term is used in the sense in which it has been judicially interpreted": *per* Lord Coleridge C.J. in *Jay* v. *Johnstone* (2). The passage to which Lord Coleridge refers is at p. 571 of 14 Ch. D., and is as follows:—"If an Act of Parliament uses the same language which was used in a former Act of Parliament referring to the same subject, and passed with the same purpose and for the same object, the safe and well-known rule of construction is to assume that the Legislature, when using well-known words" [the words in question here have been constantly the subject of judicial interpretation since *Morrison* v. *Glover* (3) in 1849] "upon which there have been well-known decisions, uses those words in the sense which the decisions have attached to them." It is impossible to conceive a stronger case than that of the Friendly Society statutes to which I have referred: decision of the Courts in 1894; amendment, 1895; re-enactment, 1896; amendment in 1908.

If "dispute" in the Act of 1896 had the meaning put on it in *Stone's Case* (4) in 1894, it is impossible to contend that it should not have the same meaning in the identical section in the Act of 1893 with which we are dealing.

On the whole, I cannot think that *Stone's Case* (3) and *Cox* v. *Hutchinson* (5) were overruled by a case in which two of the three judges never even referred to them, and in which the third practically said they had no bearing on the case before them; there being no suggestion of overruling them, or of deciding anything inconsistent with them in any of the judgments.

Lastly, under sect. 23, sub-s. 1, of the Act of 1893 (56 & 57 Vict. c. 39), a member can be sued by the society for all moneys payable by him to the society, either in the county court of the district in which the registered office is situate, or in that of the district in which he resides. There is no limit as to amount. This, of course, would apply to money payable under a rule. The *Coolmoyne Case* (6) was such a case, and we held that in such a

(1) 14 Ch. D. 563.
(2) [1893] 1 Q. B., at p. 28.
(3) 4 Exch. 430.
(4) 63 L. J. Q. B. 471.
(5) [1910] 1 Ch. 513.
(6) [1917] 2 I. R., p. 107.

Appeal. 1916.

M'ELLISTRIM v. BALLYMACELLIGOTT CO-OPERATIVE SOCIETY.

Ronan L.J.

case the County Court had jurisdiction to try whether the rule was ultra vires. It seemed to us that there could be no doubt about this. Take the converse case of a member claiming moneys exceeding the ordinary County Court limit payable to him by the society under an old rule. Prima facie this would clearly be a dispute within the jurisdiction of the County Court under sect. 49, sub-s. 5, if the rules contained no directions, or no decision was made within forty days.

If in such a case the society alleged the rule was ultra vires, would this oust the jurisdiction of the Court? It would, if the respondent's contention in this case is right. The result would be that in a case of a claim for £60 under a rule, a question of ultra vires can be tried by the County Court where the society is plaintiff, but cannot where a member is plaintiff, and he must go to the High Court.

However, both my colleagues are of opinion that the present case is governed by *Heard* v. *Pickthorne* (1). Indeed, I think the Lord Chancellor had arrived at the same conclusion before he had seen that case. In the circumstances, my opinion is immaterial as to the result; and I shall not dissent from the judgment that the action should not be stayed at this stage.

MOLONY L.J.:—

This action was brought for the purpose of testing the validity of certain rules adopted by the defendant society, which rules were registered by the Registrar of Friendly Societies on the 1st of February, 1916. The defendants moved to stay the action on the ground that the difference between the parties was a dispute which, under the provisions of sect. 49, sub-s. 1, of the Industrial and Provident Societies Act, 1893, should be decided in the manner directed by the rules of the society if they contained any such direction; and that rule 69 of the society provided for such disputes being submitted for arbitration to the Committee of the Irish Agricultural Organisation Society.

The plaintiff contends that the arbitration clause does not apply in the present case, because the action is not brought in

(1) [1913] 3 K. B. 299

reference to a dispute arising under the rules, but, on the contrary, is brought to have certain of the rules declared illegal as contrary to public policy, and in unreasonable restraint of trade.

The plaintiff also complains that there were certain irregularities of procedure at the meeting which adopted the rules; but once rules have been registered, it is quite settled that the registrar's certificate is conclusive as to the validity of the proceedings taken by the society for the passing of the rules: *Rosenberg* v. *Northumberland Building Society* (1); *Butler* v. *Springmount Co-operative Dairy Society* (2).

The onus is on the defendants of satisfying the Court that the statute has deprived the plaintiff of his right to seek redress, and they have endeavoured to discharge this onus by referring to a number of cases in which the Courts have stayed actions in the case of disputes under the Act. The three cases relied upon by the defendants—*Stone* v. *Liverpool Marine Society* (3), *Catt* v. *Wood* (4), and *Cox* v. *Hutchinson* (5)—were all cases in which the question was, as has already been pointed out, whether certain acts of the committee purporting to bind the society were or were not within the power of the society. All these cases were considered by the Court of Appeal in England in the recent case of *Heard* v. *Pickthorne* (6); and it was there held that where a resolution or rule relied on was illegal and ultra vires, it was not a matter of domestic administration which, under sect. 67 of the National Insurance Act, 1911, ought to go to arbitration, and that the plaintiff was entitled to bring the action. Sect. 67 of the National Insurance Act, 1911, is in substance the same as sect. 49 of the Industrial and Provident Societies Act of 1893, which is relied on by the defendants in this case.

The plaintiff in the present case impeaches the legality of the rules just as the plaintiff in *Heard* v. *Pickthorne* (6) impeached the validity of the resolution, and it appears to me to be clear from the judgments in the Court of Appeal that sect. 49 cannot be held to apply to a case where the legality of the rule is impeached. In *Heard's Case* (6) the society made a resolution that

(1) 22 Q. B. D. 373.
(2) [1906] 2 I. R. 193.
(3) 63 L. J. Q. B. 471.
(4) [1910] A. C. 404.
(5) [1910] 1 Ch. 513.
(6) [1913] 3 K. B., at p. 229.

Appeal. 1916.

M'ELLISTRIM v BALLYMACELLIGOTT CO-OPERATIVE SOCIETY.

Molony L.J.

in order to entitle a member to sickness benefit a certificate from a panel doctor must be sent. The plaintiff brought an action asking for a declaration that the resolution of the society was illegal and ultra vires. There was no motion to stay, but at the trial Bailhache J. dismissed the action on the ground that the dispute was a matter relating to domestic administration which, under sect. 67 of the National Insurance Act, 1911, ought to go to arbitration; and this decision was unanimously reversed by the Court of Appeal. The judgments of the three learned Lords Justices seem to me to be peculiarly applicable to the present case, and lead me to the conclusion that this appeal ought to be dismissed. I am not, however, to be taken as expressing any opinion as to the binding force on the plaintiff of the rules in the present case. It may be, as the Lord Chancellor suggests, that to bind the plaintiff against his will by new rules, which so fundamentally alter the relations between him and the society, would be such a violation of the principles of natural justice as to call for the intervention of the Court. It may be that, having regard to recent authorities, the rules would be considered ex facie legal, as I at present think; it may be that, even if ex facie legal, they would, in the light of surrounding circumstances (if properly pleaded), be held to be illegal: *North-Western Salt Co., Ltd.*, v. *Electrolyte Alkali Co., Ltd.* (1). It is, however, clear that by refusing to stay the action on this interlocutory application the defendants will not be precluded from raising the question by the pleadings, and ultimately obtaining the decision of the supreme appellate tribunal upon it, as well as upon the other very important questions which arise in the case.

R. ST. J. C.

Solicitor for the respondent: *E. B. Slattery.*
Solicitor for the appellants: *J. D. O'Connell.*

(1) [1914] A. C. 461.

M'DOWELL *v.* M'NEILLY.

(1916. No. 134.)

M. R.
1916.
July 12, 13, 27.

Husband and Wife — Advancement — Deposit Receipt in Joint Names of Husband and Wife — Money payable to Husband or Wife or the Survivor — Reservation of Power to revoke gift.

A sum of money was placed by a man on deposit receipt in bank in the names of himself and his wife, but it was payable to him or his wife, or the survivor. Shortly before his death he indorsed and handed the deposit receipt to the defendant, a clergyman, for charitable purposes, who cashed it forthwith. The plaintiff, widow of the deceased, brought an action against the defendant for a return of the money on the ground, amongst others, that there was a gift of the money to her by way of advancement in the event of her surviving her husband, and that, he having made the gift, was not competent to withdraw it.

Held, that the deceased gave to himself or his wife the power to withdraw the money, and that this was a reservation of a power to revoke the gift which he was entitled to make, and that the action could not be maintained.

Trial of Action.

The following statement of facts is taken from the judgment of O'Connor M.R.:—

This action was brought for the recovery of the proceeds of certain deposit receipts which had been endorsed by James McDowell, deceased, to the Reverend Samuel McNeilly. The plaintiffs are the personal representatives of James McDowell, and he had on deposit in the Northern Banking Co., Belfast, a sum of £400, for which he held a deposit receipt dated 27th August, 1906, and a further sum of £100, for which he held a deposit receipt dated 26th November, 1912. Both these deposit receipts were in his sole name. James McDowell had also deposited in the same bank a further sum of £200 in the joint names of himself and the plaintiff, Jane McDowell, who was his wife, for which he held a deposit receipt dated 22nd August, 1908, and a further sum of £300 in the same joint names, for which he held a deposit receipt dated 9th January, 1911. The

M. R. 1916.

M'DOWELL *v.* M'NEILLY.

two last-mentioned deposit receipts were in a form which appears to be commonly used in the North of Ireland, but which is not usual in other places. By these deposit receipts the bank promised to be accountable to either of the persons in whose names the moneys were deposited, or to the survivor of them. The total principal sums deposited on all the deposit receipts I have mentioned amount to £1000, which carried interest.

James McDowell died on the 14th February, 1914, having made his will, dated 29th May, 1907, by which he made his wife, Jane McDowell, his residuary legatee and devisee. He appointed John Porter, the Reverend Professor James Dick, and Thomas C. Houston, his executors. Probate of the will was, on the 4th May, 1914, granted to the Reverend Professor James Dick and Thomas C. Houston, John Porter having renounced.

Shortly before his death, and during his last illness, the testator indorsed the several deposit receipts to the Reverend Samuel R. McNeilly, a clergyman of the Reformed Presbyterian Church of Ireland, and the reverend gentleman cashed the deposit receipts immediately after.

The deceased was a very devout member of the Reformed Church, and was in close spiritual association with Mr. McNeilly. The deposit receipts were indorsed in a private interview between them. The wife of the deceased knew nothing of the transaction at the time, and did not discover it till after his death. The action was brought by Jane McDowell, the widow and residuary legatee, and Thomas C. Houston, one of the executors, against Mr. McNeilly, for the recovery of the amount of the several deposit receipts and interest as personal estate of the deceased. The Reverend Professor Dick was named as a formal defendant, he having declined to join with the plaintiffs in the action. By amendment the Attorney-General was also made a defendant, as it appeared that a charity was involved.

There were two distinct claims made, one in respect of all the deposit receipts, the other in respect of the deposit receipts which were in the joint names of the deceased and his wife. As to the first, the entire transaction was impeached on the ground that it was the result of undue influence practised on the deceased by the Reverend Mr. McNeilly; as to the second, it was contended that

the moneys which were deposited in the joint names were so deposited in order to make an advancement for the deceased's wife in case she survived her husband, and that he had not power without her concurrence to appropriate the moneys deposited.

The plaintiff, Jane McDowell, in her evidence stated that her husband told her that the money was for her if anything happened to him. She knew nothing of the handing over of the receipts to the defendant. The defendant suggested to the deceased that he should inform his wife of his intention to hand over the deposit receipts to the defendant, but the deceased said that that was not necessary.

S. L. Brown K.C. and *Megaw*, for the plaintiff:—

The deposit receipts here are in a form used by the Northern Bank when money is to be placed in two names, and are payable to one or the other or the survivor. The form of the requisition for the deposit receipt corresponds with it, i.e. for a deposit receipt, to be payable to *A* or *B* or the survivor. A deposit by a husband of his own money in the names of himself and his wife is prima facie evidence of an advancement to his wife, and if unexplained raises a presumption in her favour which is capable of being rebutted: *In re Condrin, Colahan* v. *Condrin* (1). Besides, the deceased had money on deposit in his sole name, and there must have been some reason for making the deposits in the joint names. Mrs. McDowell, in her evidence, said that her husband told her that the deposit receipts in their joint names were meant for her if anything happened to him.

Herbert Wilson K.C. and *Andrews*, for the defendant M'Neilly:—

There is a presumption of advancement in such a case, but here the deceased retained the deposit receipts in his possession and had absolute dominion over them. The gift to the wife was ambulatory until the death of the husband, who was the owner of the money: *Dummer* v. *Pitcher* (2); *Talbot* v. *Cody* (3); *Dyer* v. *Dyer* (4), 2 White and Tudor L. C., 8th ed., at p. 843. Different

(1) [1914] 1 Ir. R. 89.
(2) 2 M. & K. 262, 274.
(3) Ir. R. 10 Eq. 138, 145.
(4) 2 Cox 92.

M. R. 1916.

M'DOWELL v. M'NEILLY.

principles apply in the case of a deposit receipt like the present, which is not in the usual form. The form used here makes clear the power of control which the owner of the money has, and if he exercises the power at any time during his life, that is a revocation of any contingent gift to the wife. Mrs. McDowell stated that the conversation which she had with her husband was to the effect that the money deposited was to be for her if anything happened to him, i.e. that her husband could deal with it in his lifetime. There was therefore no complete gift to her.

In *Diver* v. *McCrea* (1), a civil bill appeal of circuit, a case of uncle and nephew, Gibson J. recognized the jus disponendi of the uncle making the deposit of his own money in the names of himself and his nephew. There the deposit receipt was in the same form as here, enabling either of the parties to draw the money, but it was not intended to divest the uncle's ownership absolutely, but only for the purpose of enabling the nephew as his uncle's agent to draw the money for him should he require it. There the jus disponendi was not exercised, and it was held that the nephew as survivor was entitled to the money. Here it was exercised. The deceased only gave to his wife a contingent interest if she survived him, and if he had not exercised the power of cashing the receipt in his lifetime. He could do what he liked with the money, as it was his own. She says that she was to have it if anything should happen to him, *i.e.* that the extent of the advancement was to be from his death. A beneficial interest in her would only arise on his death without having disposed of it.

Megaw in reply :—

Diver v. *McCrea* (1) is not an authority for the defendant. Gibson J. there was of opinion that the power to draw the money during his lifetime which Kilpatrick possessed, but had not exercised did not prevent the gift from operating. The deposit receipt here put the parties on an equality and is not transferable. We submit that the advancement took place the moment the document was executed even though the wife did not know of it: *Standing* v. *Bowring* (2). A trust if created cannot be displaced by anything afterwards. The evidence of Mrs. McDowell is in her

(1) 42 Ir. L. T. R. 249.

(2) 31 Ch. D. 282.

favour. She was to have it. It is rather a case of declaration of trust than of gift. He referred to *Talbot* v. *Cody* (1). *M. R.* 1916.

The case is strengthened by the fact that the deceased put some money on deposit in his own name, and some in the name of himself and his wife. M'DOWELL *v.* M'NEILLY.

O'CONNOR M.R., after stating the facts as above, proceeded as follows:— July 27.

The circumstances of the case are such that undoubtedly the onus of proving the validity of the transaction was thrown on Mr. McNeilly. This was not denied, and he willingly accepted the onus and discharged it. It is not now necessary to go into the full history of the transaction, because the plaintiffs very properly on hearing the evidence withdrew the charge of undue influence and admitted the validity of the transaction, except so far as the transaction of the deposit receipts in the joint names might be illegal on the ground which I will afterwards mention. Suffice it to say that the purpose of the transfer was to endow a charity connected with the Reformed Presbyterian Church, and that Mr. McNeilly's evidence clearly proved that he exercised no undue influence, that the gift was freely made, that it was the result of the donor's own charitable intentions, and that he was of sound mind, memory, and understanding at the time. It is only due to Mr. McNeilly to record that he entirely acquitted himself of the charge of undue influence, and that in accepting the trust which was imposed on him by the deceased he only did so in the honourable discharge of his duty as a minister of his church. The action therefore fails so far as the case is concerned with the deposit receipts which stood in the sole name of the deceased.

With regard to the deposit receipts in the joint names, the case is made that the deceased made a gift of the deposited moneys by way of advancement to his wife in the event of her surviving him, and that having done so he was not competent to withdraw it.

If the moneys were deposited in their joint names simpliciter, it is clear that they could only be withdrawn by both, and that the survivor would be absolutely entitled to the money remaining

(1) Ir. R. 10 Eq. 138, 145.

M. R. 1916.

M'Dowell v. M'Neilly.

on deposit on the death of the other. But here the depositor, who was the absolute owner, deposited the moneys in the joint names, giving himself or his wife the power to withdraw them. I think that this was a reservation to himself of a power to revoke the gift, a reservation which he was entitled to make. The exercise of the power was a destruction of the joint tenancy on which the wife's title depended, and her right by survivorship disappeared. No doubt the wife had also the power of withdrawal; and if she had exercised the power, she might claim an exclusive property in the money, but the deceased was careful that he also should have dominion over it, because the evidence is that he kept the custody of the deposit receipts, so that he alone during the joint lives should exercise the power of withdrawal. This seems to me to be the only legal aspect of the case. I must dismiss the action with costs to be paid by the plaintiff to the several defendants when taxed.

Solicitors for the plaintiffs: *C. & J. Black.*

Solicitors for the defendant M'Neilly: *Carson & McDowell.*

W. L.

HEWSON *v.* GREENE.

(1916. No. 314.)

Barton J.
1916.
Nov. 10, 15.

Poor Rate—Adjustment of Rent—Rentcharge—Perpetual Annuity—Local Government (Ireland) Acts, 1898 to 1901 (61 & 62 Vict. c. 37; 1 Edw. 7, c. 28)—Poor Relief (Ireland) Act, 1838 (1 & 2 Vict. c. 56).

By deed, dated the 4th January, 1822, M. (in consideration of the payment of £1200, and other considerations therein mentioned) granted to A. and B., their heirs and assigns, a rentcharge of £400 (Irish), charged on lands situate in the urban district of B., which were not agricultural lands, to hold same from and after his decease on certain trusts. All the estate and interest of A. and B. in the rentcharge became vested in the plaintiffs. All the estate and interest of M. in the lands charged with the rentcharge were vested in the defendants as trustees, and they were in receipt of the rents and profits paid by the tenants, which rents had been adjusted by virtue of the provisions of the Local Government (Ireland) Acts, 1898 to 1901, and they claimed in making payment to the plaintiffs of the rentcharge to deduct in every year half the standard amount of poor rate, as defined by the Local Government (Ireland) Act, 1898.

Held, that the defendants were entitled to make the statutory deduction.

TRIAL OF ACTION.

By Indenture dated the 4th January, 1822, and made between Molesworth Greene of the first part, and Reverend Rawdon Griffith Greene of the second part, Francis William Greene and Walter Hussey Griffith of the third part, and Willoughby Harcourt Carter of the fourth part, after reciting that the said Molesworth Greene was seized of the lands of Montpelier under a certain lease for lives renewable for ever, the said Molesworth Greene in consideration of the sum of £1200 paid to him by the said Rawdon Griffith Greene, and for other considerations therein mentioned, granted unto the said Francis William Greene and Walter Hussey Griffith their heirs and assigns an annuity or yearly sum of £400 lawful money of Ireland, to be paid to the said Francis William Greene and Walter Hussey Griffith

Barton J. 1916. HEWSON v. GREENE.

their heirs and assigns, from and after the decease of the said Molesworth Greene, for and during the lives named in the said lease for lives renewable for ever and in every subsequent renewal thereof, to be charged upon and issuing out of the lands of Montpelier, to hold the said annuity or yearly rentcharge unto and to the use of the said Francis William Greene and Walter Hussey Griffith, their heirs and assigns, to be paid half-yearly on the 1st May and 1st November in every year, without any deduction in respect of any present or future taxes, charges, assessments, or impositions, or any other matter, cause, or thing whatsoever, by authority of Parliament or otherwise howsoever. And it was thereby declared that the said Francis William Greene and Walter Hussey Griffith and the survivor of them, his heirs and assigns, should stand possessed of the said rentcharge or annuity of £400 in trust for the sole use of the said Rawdon Griffith Greene, his heirs and assigns, for and during the lives of the said Rawdon Griffith Greene and of any woman or women he might marry, and for and during the life of the survivor of them, and if there should be any issue of the body of the said Rawdon Griffith Greene living at the time of his death, then in trust for the sole use and benefit of the said Rawdon Griffith Greene, his heirs and assigns, but in case there should be no such issue of the body of the said Rawdon Griffith Greene, then upon certain trusts therein mentioned. Molesworth Greene died in or before 1834. Rawdon Griffith Greene died on the 28th December, 1862, leaving issue of his body him surviving. All the estate and interest of Rawdon Griffith Greene in the rentcharge of £400 (Irish) came to and became vested in the plaintiffs as trustees of the will of the said Rawdon Griffith Greene, and they were entitled to receive the same. All the estate and interest of Molesworth Greene in the lands of Montpelier were vested in the defendants as trustees under an indenture, dated 24th June, 1899.

The lands of Montpelier were situate within the Urban District of Blackrock, Co. Dublin, and were not agricultural lands. The defendants as trustees were in receipt of the rents paid by the tenants, which rents had been adjusted by virtue of the provisions of the Local Government (Ireland) Acts.

The defendants, in making payment to the plaintiffs of the

yearly rentcharge, claimed to be entitled to deduct the sum of £8 13*s.* in every year, being half the standard amount of the poor rate as defined by the Local Government (Ireland) Act, 1898.

The plaintiffs claimed a declaration that the yearly rentcharge or perpetual annuity of £400 (Irish) was payable to them by the defendants without any deduction, abatement, or adjustment whatsoever, for or in respect of poor rate, whether under the Local Government (Ireland) Acts or otherwise.

Oliver Murphy, for the plaintiffs:—

Section 75 of the Poor Relief (Ireland) Act, 1838 (1 & 2 Vict. c. 56), which enabled a person receiving and paying rent in respect of rateable property to deduct a proportionate amount of the rate from the rent paid by him, was repealed by sect. 110 of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), and schedule 6 of Part IV of the same Act.

Sect. 54, sub-s. 4, of the Local Government Act, 1898, takes the place of sect. 75 of the Poor Relief (Ireland) Act, but only to a certain extent. Sect. 54, sub-s. 4, now applies to holdings in an urban district by virtue of sect. 1 of the Local Government Act, 1901, which repealed sect. 54, sub-s. 11, of the Act of 1898 in cases where the occupier is entitled to deduct a portion of the poor rate. Sect. 54, sub-s. 4, clearly only applies to a conventional rent payable by a tenant to a landlord, and does not apply to a rentcharge. The sub-section provides that "where a person receiving rent in respect of any holding which is not agricultural land also pays rent in respect of such holding," he shall have his rent adjusted. "Holding" is defined by sect. 109 of the Local Government Act, 1898, as "any house or land, or house and land, held by a tenant of a landlord for the same term and under the same contract of tenancy." "Rent" must have the same meaning all through the section. No doubt the term "rent" in the Irish Poor Relief Act includes rentcharge by the interpretation section of that Act (sect. 124), and the terms of sect. 75 of that Act are clearly applicable to a rentcharge as well as to a conventional rent. The words in sect. 75 are: "where any person receiving rent in respect of any rateable property shall also pay a rent in

Barton J. 1916. HEWSON v. GREENE.

respect of the same." "Rateable property" is the proper expression where a rentcharge is paid, and "holding" where a conventional rent is paid.

E. S. Murphy, for the defendants:—

The policy of sect. 54 of the Local Government (Ireland) Act, 1898, is, that by adjustment of rent between landlord and tenant, the persons interested in the lands may be placed in the same positions respectively as regards incidence of burdens as they had previously occupied during the standard financial year (1896–1897). It is against that principle that the argument of Mr. Oliver Murphy is directed.

Curiously enough, this is the first time since the passing of the Act of 1898 that this present question has actually arisen for decision. But the argument in *Corcoran* v. *Wade* (1) was entirely based on the assumption that the statutable right of deduction exists. That was the basis of the decision in the case, and it clearly shows what has been, and is, the opinion of the profession on the construction of this section.

There is no definition of the word "rent" in the Local Government (Ireland) Act, 1898, but sect. 124 of the Poor Relief (Ireland) Act, 1838, does contain such definition, and it includes rentcharge. Admittedly the statutes are in pari materiâ, and the Act of 1898 is to be read as amending the other, both forming part of one general code. (See sect. 109, sub-s. 2, of the Local Government (Ireland) Act, 1898.)

Certain sections of the Poor Relief (Ireland) Act, 1838, have been repealed, but others or portions of the same dealing with "rent" are unrepealed, and in such unrepealed provisions the word "rent" must bear the same interpretation as before any statutable alteration. "Rent," therefore, includes rentcharge. The provisions of sect. 79 of the Act of 1838, declaring that receipts for rates are to be taken in payment of rent, and of sect. 80, giving the definition of "ratepayers," are still in operation. In accordance with the policy and provisions of the Acts taken together, we claim the right to make the statutory deduction for poor rate.

(1) [1913] 1 I. R. 25.

No doubt, in the commencement of sub-sect. 4, "rent" may mean conventional rent by reason of its context, because it is rent "in respect of any holding"; but in the latter parts of the section its meaning is not so limited by any such qualifying clause. Where there is no such limitation, it must fairly include rentcharge. That is the common-sense construction of the sub-section having regard to its subject-matter.

But if there is any ambiguity in the meaning of the word as used in sect. 54, sub-s. 4, then we are entitled, or rather required, to resort to the definition clause of the Act in pari materiâ: *Bradlaugh* v. *Clarke* (1); *Reg.* v. *Titterton* (2).

Oliver Murphy, in reply :—

There is no ambiguity in sect. 54, sub-s. 4; therefore a statute in pari materiâ cannot be resorted to. An ambiguity cannot be created by bringing in a prior Act, although it may be in pari materiâ.

Sections 79 and 80 of the Poor Relief Act of 1838 have still subject-matters to act on, viz.: holdings in an urban district where the occupier is entitled to deduct the whole of the poor rate. See sect. 54, sub-s. 11, of the Local Government (Ireland) Act, 1898, and sect. 1, sub-s. 1, of the Local Government (Ireland) Act, 1901.

Nov. 16.

BARTON J.:—

The defendants are persons who receive rent in respect of non-agricultural lands, and pay a rentcharge to the plaintiffs in respect of the same lands. The question for decision is whether the defendants, when paying the rentcharge to the plaintiffs, are entitled to make a deduction for poor rate under sect. 54, sub-s. 4, of the Local Government (Ireland) Act, 1898.

The Local Government Act contains no definition of "rent"; but sect. 54, sub-s. 4, replaced sect. 75 of the Poor Relief (Ireland) Act, 1838, in which "rent" included "rentcharge." The two sections are in pari materiâ, and the earlier one may be referred to for the purpose of construing such a flexible word as "rent" in the substituted section. Examples of the flexibility of the word

(1) 8 Ap. Cas. 354. (2) [1895] 2 Q. B. 61, 67.

Barton J. 1916.

HEWSON v. GREENE.

"rent" are to be found in the Real Property Limitation Act of 1833, where it is used sometimes in the sense of rentcharge, sometimes in that of ordinary rent. For example, in sect. 8 it is used in one of these senses at the beginning of the section, and in the other sense at its close. In sect. 9 it occurs seven times, three times in the sense of rentcharge, and four times in the sense of ordinary rent: *Doe d. Angell* v. *Angell* (1).

In the present case the word "rent" occurs seven times in this sub-section. In the first, third, and seventh places it refers to the rent which the middleman receives, and in the second, fourth, fifth, and sixth places to the rent which the middleman has to pay. In the latter places, at all events, I am of opinion that it includes rentcharge. This view of the law underlay the arguments and judgment in *Corcoran* v. *Wade* (2). Accordingly, I dismiss the action.

Solicitors for the plaintiffs: *Moore, Keily, & Lloyd.*
Solicitors for the defendants: *H. & W. Stanley.*

R. W. L.

(1) 9 Q. B. 328, at p. 356. (2) [1913] 1 I. R. 25.

SARTORIS, Lessor; SHACKLETON and Another, Lessees (1).

Appeal.
1917.
Jan. 15, 16.

Land Law Acts—Character of Holding—Crucial Date—Redemption of Rent (Ireland) Act, 1891 (54 & 55 *Vict. c.* 67)—*Application to redeem Rent.*

In an application by lessees to have the rent of a holding redeemed under the provisions of the Redemption of Rent (Ireland) Act, 1891, the main question in issue was whether the premises were substantially agricultural or pastoral.

Held (reversing Fitzgerald J.), that the crucial time for ascertaining the status of the holding, as distinguished from the status of the tenant, was the date of the passing of the Land Law (Ireland) Act, 1896.

Appeal by the lessor from an order of Mr. Justice Fitzgerald, dated 9th June, 1916, whereby it was declared that the lessees were entitled under the provisions of the Redemption of Rent (Ireland) Act, 1891 (54 & 55 Vict. c. 67), to have a rent of £175 payable in respect of a holding in Co. Kildare redeemed.

The holding in question contained 77a. 2r. and 21p., and was held by the lessees, Ebenezer Shackleton and Charles D. Shackleton, under a lease dated 28th September, 1859, for a term of 999 years, at the yearly rent of £175, adjusted to £172 15*s.* 6*d.* In the lease the premises were described as part of the lands of Belan, called Bushy Park, bounded as therein mentioned, and delineated by the map thereof in the margin of the lease. The lease contained a covenant by the lessees to keep all fences and enclosures on the demised premises, and all improvements made or to be made thereon, in good repair, and at the determination of the term to deliver up the quiet possession thereof in like good repair. In the lease there was no mention of any buildings; but on the map thereon, buildings known as Belan Cottage, and also a mill, were delineated.

Mr. Richard E. Shackleton, to whom the lease was made, was a member of the firm of E. Shackleton & Sons, who carried on the

(1) In the Court of Appeal, before Sir Ignatius J. O'Brien C., and Ronan and Molony L.JJ.

Appeal. 1917.

SARTORIS v. SHACKLETON.

business of millers at Carlow and some other places. In 1860 he proceeded to erect a new flour-mill on the holding, beside the old mill. He was also the tenant of an adjoining farm, known as Belan Lodge, subsequently purchased under the Land Purchase Acts. On this farm he made a mill-race to improve the water-power for the mills on the holding before the Court.

On the 1st August, 1872, the lessee demised to the milling-firm, consisting of himself, Ebenezer Shackleton, and Patrick Dudley Shackleton, portion of the premises comprised in the lease of 1859, viz., the flour-mills and mill-premises of Belan, and the paddocks annexed, together with the mill-dam, race, and tail-race, for 986 years, at the yearly rent of £100. The lease contained a power of surrender at the end of every fifth year, upon six months' notice.

In 1908 the new mill erected by Mr. Richard E. Shackleton was burned down, and £2000 insurance on same was paid by the Insurance Company. This mill was not rebuilt.

On the 28th December, 1911, Ebenezer Shackleton, one of the applicants in this case, and Theobald Shackleton, in whom the lessees' interest under the lease of 1872 was then vested, sub-demised to Robert Hegarty, miller, the Belan mills, with the rights of water thereunto belonging, for twenty years, at the yearly rent of £25. The lease contained a provision that the lessor might determine it at the end of the tenth year, upon three months' notice, and that the lessee might also determine the lease at the end of every fifth year, upon similar notice. In 1914 the mill comprised in this lease was burned. The lessors received £1000 and the lessees £600 insurance. This mill had not been rebuilt, although it belonged to the landlord, having been on the holding prior to the lease of 1859.

Since the fire of 1914 the sub-lessee had abandoned the premises, and the lessors had resumed possession, although the lease had not been surrendered, or the premises comprised in it evicted. It appeared that the old mill in existence in 1859 had been used prior to that date, not as a flour mill, but for the purpose of grinding farmers' corn for cattle. Originally, according to the lessees, the lands were used as grazing lands, and, with the exception of the small portion of about four acres sub-demised in

1872, they continued to be so used. The new mill, which was burned in 1908, stopped working in 1906, because, according to figures supplied by the lessees, it had been worked at a loss.

On December 14th, 1914, the lessees gave notice of an application to redeem the rent, or, in the alternative, to fix a fair rent. The lessor resisted the application upon two grounds—1, that the holding was not an agricultural or pastoral, but a mill holding; 2, that the lessees were not in bona fide occupation of the holding, a part being sub-let, and seven-eighths in value not remaining in the occupation of the lessees.

Mr. Justice FitzGerald found that the lessees were in occupation of more than seven-eighths in value of the holding. Dealing with the question, whether the holding was agricultural or pastoral, or whether it was a mill holding, the learned Judge, in the course of his judgment, said:—

"On the whole, my view is that the holding was substantially agricultural at the date of the lease of 1859, and that whatever may have been its character in the interim, since 1908 it has a substantially agricultural character, and since 1914 an almost purely agricultural character. The question then arises: if the holding was agricultural when let in 1859, and if it has now the same character, although at the passing of the Land Act of 1896 it could not be said to have been substantially agricultural, is it within the Redemption of Rent Act?

"The decisions in *Nelson* v. *Headfort* (1) and *Gaffney* v. *Fetherstonhaugh* (2), fixing a crucial date in town parks and pasture holdings, deal with the residence of the tenant, and not with the character of the holding, which may change during the tenancy, but, if it does, it may also change back to its original character. I think this follows from Lord Justice Holmes' views as to change in *Gloster* v. *Ryan* (3) and *Connolly* v. *Stewart* (4). On the whole, though the case is not free from difficulty, I think the tenants can maintain the application, and the objections of the landlord that the holding is substantially agricultural or pastoral cannot be sustained."

(1) 18 L. R. Ir. 407.
(2) [1900] 2 I. R. 417.
(3) [1899] 2 I. R. 174.
(4) 1 N. I. J. R. 233.

Appeal. 1917.

SARTORIS v. SHACKLETON.

Meredith K.C. (with him *Sealy*), for the appellant:—

There are two questions involved in this appeal—1, whether the holding is substantially agricultural or pastoral, or a mill holding; 2, whether the applicants are in bona fide occupation? As to the first the judicial commissioner has decided that the date at which the status of the holding is to be ascertained is the date of the application, *i.e.*, 1914, not the date of the passing of the Act of 1891, or the Act of 1896. In support of his judgment he relies on the decisions of this Court in *Gloster* v. *Ryan* (1) and *Connolly* v. *Stewart* (2). These decisions do not modify the general principle established by *Nelson* v. *Headfort* (3) and *Gaffney* v. *Fetherstonhaugh* (4), which is that the status of the holding, as distinguished from the status of the tenant—the question of occupation—must be determined at the date of the Act relied upon to bring the case within the Land Law Acts.

This principle was explained and affirmed in *Cowell* v. *Buchanan* (5) by Lord Ashbourne C., at p. 63; by FitzGibbon L.J. at pp. 65-66; by Walker L.J., at p. 71, and by Holmes L.J., at p. 73.

[They were stopped by the Court.]

Serjeant Matheson K.C. (with him *E. S. Murphy*), for the respondents:—

At the date of the lease in 1859 the holding was clearly an agricultural holding, and in the interval between the demise and the present application its character had not changed. Even if the original character had at some period changed, it has changed back.

Nelson v. *Headfort* (3) and *Gaffney* v. *Fetherstonhaugh* (4) are so dissimilar in their facts that the principle laid down in the judgments should not be applied in the present case. The observations cited from the judgments in *Cowell* v. *Buchanan* (5), as to the effect of the decisions in the two cases just mentioned, were

(1) [1899] 2 I. R. 174.
(2) 1 N. I. J. R. 233.
(3) 18 L. R. Ir. 407.
(4) [1900] 2 I. R. 417.
(5) [1903] 1 I. R. 58.

obiter dicta. Moreover, Naish C. delivered a dissenting judgment in *Nelson* v. *Headfort* (1); and as sect. 9 of the Land Law (Ireland) Act, 1887, adopts that judgment, the case may be regarded as reversed by the Legislature. *Gaffney* v. *Fetherston-haugh* (2) did not decide that the character of the holding was to be exclusively determined by what in fact it was on August 15, 1896, *per* Walker L.J. in *Kilkelly* v. *Caldwell* (3), at p. 564.

SIR IGNATIUS J. O'BRIEN C.:—

So far as this Court is concerned, we shall confine our decision to the net question of law determined in favour of the lessee by Mr. Justice FitzGerald. His decision on this question is contained in two short passages of his judgment. He says:—"On the whole, my view is that the holding was substantially agricultural at the date of the lease of 1859, and that whatever may have been its character in the interim, since 1908 it has a substantially agricultural character, and since 1914 an almost purely agricultural character. The question then arises: if the holding was agricultural when let in 1859, and if it has now the same character, although at the passing of the Land Act of 1896 it could not be said to have been substantially agricultural, is it within the Redemption of Rent Act?" He was of opinion, as I understand his decision, that the crucial time for determining the status of the holding was not the date of the passing of the Land Act of 1896, but the date of the application for redemption.

A decision on the net question of law involved may materially affect the alternative application to have a fair rent fixed. Whatever may have been the character of the holding at the date of the application for redemption, there can be no doubt that at the dates of the passing of the Land Acts of 1881 and 1896, its status was such as might—I do not say necessarily would—justify a decision hostile to the tenant. Mr. Justice FitzGerald considered that his conclusion followed from the views expressed by Holmes L.J. in *Gloster* v. *Ryan* (4) and *Connolly* v. *Stewart* (5),

(1) 18 L. R. Ir. 407.
(2) [1900] 2 I. R. 417.
(3) [1904] 1 I. R. 550.
(4) [1899] 2 I. R. 174.
(5) 1 N. I. J. R. 233.

Appeal. 1917.

SARTORIS v. SHACKLETON.

Sir Ignatius J. O'Brien C.

and we have to consider whether the views referred to justified his conclusion. The opinion of all the members of the Court in *Cowell* v. *Buchanan* (1) on this question is so clear and absolutely unambiguous that if it be binding on me, there is really nothing further to discuss. Holmes L.J., at p. 73, says :—"There are two conditions of things dealt with in the Land Law Acts. The one is the status of the holding, the other the status of the tenant. The status of the holding must exist when the Act of 1881, or some amending Act, came into operation. This was the subject of consideration in *Nelson* v. *Headfort* (2) and *Gaffney* v. *Fetherstonhaugh* (3). The status of the tenant is to be ascertained when he makes his application. The Land Law Acts have always been construed on this principle; and there is no good reason for refusing to apply it to the first section of the Redemption of Rent Act." He was of opinion in that case that the question was not the status of the holding, but the status of the tenant; and incidentally he refers to *Nelson* v. *Headfort* (2) and *Gaffney* v. *Fetherston-haugh* (3) as showing that the status of the holding was to be determined as at the date of the passing of the Act.

FitzGibbon L.J., at page 65, says :—"The question—what is the 'crucial date'?—appears to me to be covered by decision. There are two sets of sections, one defining the status of the tenant, the other defining the character of the holding. Both must be satisfied to bring a case within the Land Law Acts. Since *M'Carthy* v. *Swanton* (4) it has always been held that the status of the tenant as to occupation is to be ascertained at the date of his application. But the holding must have the prescribed character when the Land Law Acts first applied to the land, except where otherwise expressly provided." It has been suggested that these passages should be taken as obiter dicta only. I do not agree that they are merely obiter dicta, and I think FitzGibbon L.J. accurately states the effect of the cases. It will also be observed that in the last edition of Cherry's Land Acts, at p. 521, the view is taken that the crucial date for determining the character of the holding is the date of the passing of the Act. It may, therefore, be assumed that until the present case it was

(1) [1903] 1 I. R. 58.
(2) 18 L. R. Ir. 407.
(3) [1900] 2 I. R. 417.
(4) 14 L. R. Ir. 365.

accepted as settled law that the status of the holding was to be ascertained with reference to the date at which the Act sought to be applied was passed.

In reference to *Nelson* v. *Headfort* (1), it was pointed out by Serjeant Matheson that sect. 9 of the Land Law (Ireland) Act, 1887, was undoubtedly passed to get rid of the inconvenience which would follow if, for the purpose of bringing a holding within the rent-fixing provisions, it had to be held that the status of the holding was, in every case, to be determined as at the date of the passing of the Act. The majority in this Court held that the status of the tenant should be determined by the date of the passing of the Land Law (Ireland) Act, 1881. The tenant in that case, both at the time of the letting and of the passing of the Act, resided in the town, but, subsequently, he went to live upon the lands, and while there served an originating notice. Naish C. dissented, and was of opinion that the time when residence in the town should be proved to bring the case within the exception in sect. 58 was the date of the service of the originating notice. Section 9 of the Act of 1887 gets rid of the effect of the decision of the majority of the Court so far as town parks and residence within the town are concerned, and adopts the view of Lord Chancellor Naish. But the argument that the section also affected the prior decisions in regard to the status of the holding is unsustainable. It left the decisions for one purpose untouched, and modified them for another purpose. The argument of the respondent is disposed of by a passage in the judgment of FitzGibbon L.J. in *Gaffney's Case* (2). At page 427 he says:—"Upon the question of law, I recognize the existence of difficulties in the way of either interpretation of the Act of 1896, but I find those in the landlord's way insurmountable. The words 'is in the occupation,' in the Act of 1881, sect. 58, sub-s. 2, have been conclusively interpreted to speak from the date of the Act in which they occur, and as making that the crucial date. The decision of this Court in *Nelson* v. *Headfort* (1) to that effect was adopted and enforced by the Act of 1887, sect. 9."

(1) 18 L. R. Ir. 407.

(2) [1900] 2 I. R. 417, 422.

Appeal.
1917.

SARTORIS
v.
SHACKLETON.

Sir Ignatius J. O'Brien C.

While quite appreciating the point that *Nelson* v. *Headfort* (1) may be said to deal with the status of the tenant as distinguished from the status of the holding, I have referred to the passage just cited from the judgment of FitzGibbon L.J., in consequence of the argument addressed to us to the effect that sect. 9 of the Act of 1896 also modified the law governing the status of the holding. *Nelson* v. *Headfort* (1) and *Gaffney* v. *Fetherstonhaugh* (2) clearly bear the interpretation put upon them by the Lords Justices in *Cowell* v. *Buchanan* (3); and the passages in these cases, described as obiter dicta, are a correct statement of the law. It has been said that this view is affected by *Kilkelly* v. *Caldwell* (4); but in that case Meredith J. says, at p. 556: "I think I should be pushing the decision in *Gaffney* v. *Fetherstonhaugh* (2) to a point never dreamt of by the Court of Appeal if I were to hold that the Court was bound to look for the purpose of the letting, not as a whole during the entire of the letting from start to finish, but upon the particular day that the Land Act of 1896 was passed. I think 'is let' and 'let' mean exactly the same thing; and it is a curious fact that in clause (*c*) of the 5th section of the Act of 1896, they are certainly used as synonymous terms." In that case the question was whether the exclusion in sect. 5, sub-s. 1, of the Land Act, 1896, applied to a lease made in 1863. The words in that case were, "let to be used wholly or mainly for purposes of pasture," in which case the character must be gathered "from the user of the holding during the continuance of the letting regarded as a whole." *Gaffney* v. *Fetherstonhaugh* (2) turned on the words "ordinarily used," and there is nothing in *Kilkelly* v. *Caldwell* (4) throwing any doubt on the accuracy of the decision in the two earlier authorities. *Kilkelly's Case* (4), instead of weakening, strengthens the view put forward by Mr. Meredith, because it shows that even though *Gaffney's Case* (2) was distinguished, the principle of it was affirmed.

I am, therefore, of opinion that Mr. Justice FitzGerald erroneously interpreted the decisions when he held that the crucial time for ascertaining the status of the holding was the

(1) 18 L. R. Ir. 407.
(2) [1900] 2 I. R. 417, 422.
(3) [1903] 1 I. R. 58.
(4) [1904] 1 I. R. 550.

date of the service of the application, and not the date of the passing of the Act of 1891 or of that of 1896. In this case it is not obviously of the slightest consequence, as a matter of fact, whether the crucial date was the passing of the Act of 1891 or of that of 1896, inasmuch as the same condition of things existed in 1891 and 1896. I think, however, we ought to express an opinion as to which date is in point of law the crucial one as determining the character of the holding. A close examination of the sections shows that the crucial date is the date of the passing of the Act of 1896. Section 1 of the Redemption of Rent (Ireland) Act, 1891, enables a person in bona fide occupation as a lessee of a holding to which Part one of the Land Law (Ireland) Act, 1881, applies to redeem his rent or, in the alternative, to have a fair rent fixed. We have, therefore, to look at the Act of 1881 to see what class of holdings came within its rent-fixing provisions. Broadly speaking, they had to be, in the words of section 58, "agricultural or pastoral or partly agricultural and partly pastoral." This provision was not potent enough to include the present holding. Section 5 of the Land Law (Ireland) Act, 1896, introduced an important alteration by providing that the Land Law Acts should not apply to a tenancy in any holding "which is not *substantially* either agricultural or pastoral in its character or partly agricultural and partly pastoral." In these circumstances it seems to me that the tenant here, in order ultimately to have a fair rent fixed, must rely on the provisions of section 5 of the Act of 1896. Consequently I am of opinion that the crucial time for ascertaining the status of the holding is the date of the passing of the Act of 1896.

Having arrived at this conclusion of law, the question arises whether we ought to send the case back to Mr. Justice FitzGerald or determine it ourselves. On the whole, it is preferable that the tribunal which the Legislature has established for the purpose of determining all questions of fact should be asked to consider all the facts in their proper perspective, and with due regard to the law. We do not send it back to Mr. Justice FitzGerald to fix a fair rent. I express no opinion as to whether or not the tenant may be able to establish his case before the Court below. If I had to hear it myself, I might find it very difficult to decide in

Appeal. 1917.

SARTORIS v. SHACKLETON.

Sir Ignatius J. O'Brien C.

his favour. It is quite possible, however, that, with new evidence and the arguments to be presented, the Judge below might come to the conclusion that the character of the holding at the date of the passing of the Act of 1896 warranted him in holding that a fair rent might be fixed.

RONAN L.J. :—

I agree that we should make the order indicated by the Lord Chancellor.

Section 8 (1) of the Land Law (Ireland) Act, 1881, gave the right to have a fair rent fixed. It says: (A) "the tenant," (B) "of any present tenancy to which the Act applies," "may apply to the Court to fix the fair rent to be paid." Whether the tenancy was one to which the Act applied, depended on sect. 58 of the Act of 1881, and now depends on that section and sect. 5 of the Land Law (Ireland) Act, 1896.

As to (A) sect. 57 of the Act of 1881 says "tenant" "means a person occupying land under a contract of tenancy."

The applicant must bring the case within (A) and (B). He must show that there is a tenancy to which the Act applies, and that he is in occupation of that tenancy. These two points are quite distinct. They arise under wholly different sections. Each must be considered apart from the other, and the statutory provisions and decisions applicable to (A) must be carefully distinguished from those applicable to (B). Now, the first section of the Redemption of Rent Act, 1891, says: "Where a person in bona fide occupation of a holding" (this is (A)) "to which Part I of the Land Law (Ireland) Act applies" (this is (B)) "such occupier shall . . . be entitled to apply, &c."

In *Cowell* v. *Buchanan* (1) the Court used the convenient terms, (1) "status of tenant" as describing (A), and (2) "status of holding" as describing (B). (B) is often spoken of in the case as "the character of the holding." FitzGibbon L.J. at p. 65 speaks of (A) as "the status of the tenant as to occupation."

It is quite settled as to (A) that the applicant must show that he was in occupation at the date of the application; that the

(1) [1903] 1 I. R. 58.

Court in deciding whether the case was to be brought within (A), must treat that date as the crucial date: *M'Carthy* v. *Swanton* (1), and other cases cited at p. 345 of Cherry, Irish Land Acts. There is no question as to (A) in the present case.

It is, in my opinion, equally well settled as to (B) (the status or character of the holding) that the date of the application is not the crucial date, that the state of things at that date is not the test; but that, in cases under the Act of 1881, the crucial date was the passing of that Act (*Nelson* v. *Headfort* (2)), and since the amendment of that Act by the Act of 1896, the date of the passing of the latter Act (*Gaffney* v. *Fetherstonhaugh*) (3), where it alters the effect of the Act of 1881.

The question in the present case is whether it comes within (B), i.e. whether the holding was within the terms of sect. 1, sub-s. 1 (*a*), of the Act of 1896. FitzGerald J. held that the crucial date for determining this was the date of the application. In my opinion he applied to a question (B) of the status or character of the holding the crucial date applicable to a question (A) of the status of the tenant as to occupation. *Cowell* v. *Buchanan* (4) was a question of (A); no question of (B) arose in that case.

On the other hand, *Nelson* v. *Headfort* (2) was entirely a question of (B). The tenant was in occupation at the date of the application; no question as to (A) arose in that case—no question as to what FitzGibbon L.J. calls in *Cowell* v. *Buchanan* (4) "the status of the tenant as to occupation." The question was whether the tenancy was excluded from the Act by sect. 58, sub-s. 2, as being what is generally called a town-park. To come within that sub-section the holding must satisfy several conditions, the last of which is thus described: "and *is* in the occupation of a person living in such city or town." It was a question under sect. 8, sub-s. 1, of the Act of 1881, whether it was a "present tenancy to which this Act applies." The Court (FitzGibbon and Barry L.JJ., Naish C. dissenting) held that the words "is in occupation" in the section I have quoted referred to the date of the passing of the Act, and not to

(1) 14 L. R. Ir. 365.
(2) 18 L. R. Ir. 407.
(3) [1900] 2 I. R. 417.
(4) [1903] 1 I. R. 58.

Appeal. 1917.

SARTORIS v. SHACKLETON.

Ronan L. J.

the date of the application, and that as the tenant was not in occupation at that date, the holding was excluded from the Act.

It was beyond all doubt a question of "the status of the tenancy" as distinguished from the status of the tenant in the sense in which these expressions are used in *Cowell* v. *Buchanan* (1); a case of (B), not (A).

Unfortunately, in the headnote to *Nelson* v. *Headfort* (2) the question is spoken of as "depending on his *status as tenant* at the date of the passing of the Act." Naish C. says, at p. 415, "I am satisfied . . . that the time at which the fact of residence decides *the status of the tenancy* is the time of the lis mota," *i.e.*, the date of the application. This is the view which did not prevail; but it shows the true question and uses the correct term, "status of the tenancy." However, at p. 421, FitzGibbon L.J. says—"There is no indication . . . that a *tenant* who had or had not the necessary status to make the application when the Act passed could acquire or lose it afterwards." At p. 422 he says—"Is a tenant of town parks living out of town to lose *his* status, or is the Act to cease to apply to his holding if he temporarily moves into the town? . . ." Further down he says—"The *status of the holding* might depend upon accident." At p. 424 Barry L.J. says—"A construction which would lead to this, that a tenant could by changing his residence from time to time alter *his* status." There can be no doubt that both the Lords Justices used the term "his status" to denote what in *Cowell* v. *Buchanan* (1) is termed "the status of the tenancy." The confusion arose from the fact that the same words "in occupation of" are used in the definition of tenant in sect. 57 and in the description of the holding in sect. 58. There is no doubt about the decision, that in the former case they refer to the date of the application, in the latter to the passing of the Act. The matter is put beyond doubt by the judgment of FitzGibbon L.J., at pp. 420, 421:—"It, therefore, appears to me that the question whether or not a tenant can or cannot apply to fix a fair rent, in other words, *whether or not the Act applies to his holding*, must remain the same, and be determined in the same way at all times, and from time to time during the continuance of his

(1) [1903] 1 I. R. 58. (2) 18 L. R. Ir. 407.

tenancy, and if so the crucial moment for determining whether or not the Act applies to any tenancy must be the date of the passing of the Act."

In *Gaffney* v. *Fetherstonhaugh* (1) the principle of *Nelson* v. *Headfort* (2) was admitted; the only question was whether in that case the crucial date for determining whether the Act applied to the holding was the passing of the Act of 1881, or the passing of the Act of 1896. The Court decided it was the latter.

Nelson v. *Headfort* (2) was a decision on sect. 58 of the Act of 1881; *Gaffney* v. *Fetherstonhaugh* (1) on that section as modified by the provisions of the Act of 1896. The question in the present case is whether the Redemption of Rent Act applies to the present holding. What is the crucial date for ascertaining its character for this purpose? Mr. Justice FitzGerald says:—"The decisions in *Nelson* v. *Headfort* (2) and *Gaffney* v. *Fetherstonhaugh* (1), fixing a crucial date in town-parks and pasture holdings, deal with the residence of the tenant and not with the character of the holding; the character of the holding may change during the tenancy, but if it may change it may also change back to its original character. I think this follows from Lord Justice Holmes' views in *Gloster* v. *Ryan* (3) and *Connolly* v. *Stewart*" (4).

It is true that the two former cases dealt with the residence of the tenant, but it is an error to say that they did not deal with "the character of the holding." "Character of the holding" may mean physical character, but this is not the sense in which the expression is used in the cases. It is there used in the sense in which "status of the holding" is used in *Cowell* v. *Buchanan* (5). It rules the reply to the question: "Is the holding one to which the Land Acts apply?" as distinguished from the reply to the question: "Is the tenant in occupation of the holding, whatever its character may be?" Confining the matter to the Act of 1881, "character of the holding" includes all questions arising under sect. 58 as distinguished from questions arising under the definition of tenant in sect. 57. It was with these questions under sect. 58, and these only, that *Nelson* v. *Headfort* (2) and *Gaffney* v. *Fetherstonhaugh* (1) dealt, and the residence was one element

(1) [1900] 2 I. R. 417.
(2) 18 L. R. Ir. 407.
(3) [1899] 2 I. R. 174.
(4) 1 N. Ir. Jur. R. 233.
(5) [1903] 1 I. R. 58.

Appeal. 1917.

SARTORIS v. SHACKLETON.

Ronan L.J.

included in them. The courts held that this element, like all others, was to be ascertained once for all at the date of the passing of the Act.

It is true to say that "the character of the holding may change during the tenancy," but *Nelson* v. *Headfort* (1) is clear and specific on the point that no change *after the crucial* date can affect the question whether the Acts apply to the holding.

The character is fixed once for all at the crucial date. *Gloster* v. *Ryan* (2), to which FitzGerald J. refers, does not touch this question. There was no question of any change in the character of the *holding after the crucial* date. The judgment proceeded on the character of the holding at the crucial date, and I can find nothing in the judgment of Holmes L.J. casting any doubt on the principle of *Nelson* v. *Headfort* (1).

As stated at p. 521 of Cherry, "when this [the change] takes place, the character the holding bore at the date of the passing of this Act must determine whether it is within the Land Acts or not."

I think FitzGerald J. must have been misled by the fact that in *Nelson* v. *Headfort* (1) the term "status of tenant" is used to denote, not what it denotes in *Cowell* v. *Buchanan* (3), i.e. the occupation of the tenant under sect. 57 of the Act of 1881, but what is described in *Cowell* v. *Buchanan* (3) as "the status of the tenancy." I have gone very fully into the matter in consequence of the great weight due to any opinion of FitzGerald J. on the effect of the Land Acts.

Serjeant Matheson argued that sect. 9 of the Act of 1887 was practically a legislative repeal of *Nelson* v. *Headfort* (1). Sect. 58 of the Land Law (Ireland) Act, 1881, provides that the Act shall not apply to any holding "ordinarily termed 'town-parks,' adjoining or near to any city or town which bears an increased value as accommodation land over and above the ordinary letting value of the land occupied as a farm, and is in the occupation of a person living in such city or town or the suburbs thereof." Every incident, except residence, is still governed by *Nelson* v. *Headfort* (1); and, with that exception, sect. 9 of the Act of 1887 is a legislative affirmation of that case: See per FitzGibbon L.J. in *Gaffney* v. *Fetherstonhaugh* (4).

(1) 18 L. R. Ir. 407.
(2) [1899] 2 I. R. 174.
(3) [1903] 1 I. R. 58.
(4) [1900] 2 I. R. 417.

Tenancies substantially agricultural or pastoral were first brought in by the Land Law (Ireland) Act, 1896; and I, therefore, think that the crucial time for ascertaining the character of the holding in this case is the date of the passing of the Act of 1896. The final paragraph in the judgment of Holmes L.J. in *Cowell* v. *Buchanan* (1) appears to me to dispose of every question of law in the present case, and I respectfully adopt it.

MOLONY L.J. :—

Two questions were argued before Mr. Justice FitzGerald, namely—1, that the holding was not one to which Part I of the Act of 1881, as modified by the Act of 1896, applied; and 2, that the lessees were not in bona fide occupation. He considered that the crucial time for ascertaining whether the holding was substantially agricultural or pastoral was the date of the application for redemption. The two questions involved depend upon entirely different considerations. It is quite clear that the first relates to the status of the holding, while the second is conversant with the status of the tenant.

It was held in *Nelson* v. *Headfort* (2) that the crucial date in reference to the status of the holding, properly so called, was the date of the passing of the Act of 1881. That case referred to town parks; and when the Act of 1887 came to be passed, in the following year, certain amendments in the law were made; but so far from altering the principle of *Nelson* v. *Headfort* (2), sect. 9 of the Act affirmed that principle, except in regard to two particular matters dealt with in the section. Sect. 5 of the Act of 1896 altered and to some extent repealed the provisions of sect. 58 of the Act of 1881; and the combined effect of the two new sections was that certain provisions and exclusions in sect. 58 of the Act of 1881 were left untouched, while certain modified exceptions were introduced.

As regards the exception alleged to be applicable to the present case, the question arises: what is the crucial date for ascertaining whether the holding was substantially agricultural or pastoral? That question is, I think, conclusively settled by *Gaffney* v. *Fetherstonhaugh* (3). It decides that the crucial date at which

(1) [1903] 1 I. R. 58. (2) 18 L. R. Ir. 407. (3) [1900] 2 I. R. 417.

Appeal. 1917.

SARTORIS v. SHACKLETON.

Molony L.J.

exceptions in sect. 5 take effect is the date of the passing of the Act of 1896. Accordingly, the crucial date in regard to the status of the holding is the date of the passing of that Act. In so far as the exceptions in sect. 58 of the Act of 1881 remain unaffected by sect. 5 of the Act of 1896, the date of the passing of the Act of 1881 is still the crucial date.

It is unnecessary to refer in detail to the case of *Cowell* v. *Buchanan* (1), which has been fully dealt with by my colleagues. Suffice it to say that the passage in the judgment of Holmes L.J., at p. 73, sums up in precise and accurate language the effect of the legislation and of the previous decisions. [His Lordship read the passage at p. 73, cited supra.] That passage determines the law applicable to the present case. The status of the holding—whether it is substantially an agricultural or pastoral or a mill holding—must be determined as of the date of the passing of the Act of 1896; the status of the lessees or tenants—the question whether they were in bona fide occupation—must be determined as of the date of the application. Mr. Justice FitzGerald considered that the crucial date in respect of both these matters was the date of the application. I think, however, that we should specifically declare in our order that the question whether the provisions of the Redemption of Rent (Ireland) Act, 1891, apply to the holding depends on whether it was at the date of the passing of the Land Law (Ireland) Act, 1896, substantially either agricultural or pastoral in its character, or partly agricultural and partly pastoral, and that we should therefore discharge Mr. Justice FitzGerald's order, and remit the case to him for further consideration, having regard to our declaration.

Solicitor for the appellant: *H. K. Toomey.*
Solicitor for the respondents: *E. J. Jameson.*

C. L.

(1) [1903] 1 I. R. 58.

MARY ELIZABETH SAUNDERS, TENANT; G. BALDWIN HAMILTON, LANDLORD.

Appeal.
1916.
Nov. 30.
Dec. 1.

Land Law Acts—Character of Holding—Fair Rent—"Ordinary Agricultural Farm"—Nursery—Town-Park—Accommodation Land—Practice—Evidence—Assessor's Report—Land Law (Ireland) Act, 1887, *sect.* 9—*Land Act*, 1896, *sect.* 7—*Irish Land Act*, 1903, *sects.* 88 (2), 89.

Where no evidence is given on the hearing of a fair rent appeal to show that a holding, alleged to be town-park, bears an increased value as accommodation land, the judicial commissioner cannot act upon a statement to that effect in the report of his assessor.

A holding used as a nursery for the growing of forest-trees, flowers, and such like, may be an agricultural holding.

(Per Ronan L.J.). A holding so used, though agricultural in its character, is not "let and used as an ordinary agricultural farm" within the meaning of the Land Law (Ireland) Act, 1887, sect. 9.

The following is the judgment of FitzGerald J. in the Court below, delivered on the 9th June, 1916:—

This is an appeal by way of re-hearing by the landlord from the decision of the sub-commission fixing a fair rent. The area of the holding is 10A. 3R. 20P. The old rent was £30 10s. 6d.; the poor law valuation is £29 10s., of which £8 are on the holdings, and the rent fixed by the sub-commission is £26 14s. The grounds of the landlord's appeal are that the holding is a town-park, that the holding is not agricultural or pastoral, and that the tenant is not in bona fide occupation of the holding. The holding consists of 10A. 3R. 20P. It is situate three-quarters of a mile from the centre of the city of Cork. The urban boundary of the city passes through the holding, of which the greater part is included within such urban boundary. The holding was let by a lease of the 15th November, 1851, from Charles B. Baldwin, M.P., to Robert Searls, of Rutland Street, in the city of Cork, victualler, for a term of three lives, or thirty-one years, and the lease contained a covenant by the lessee to keep the demised premises and all improvements made or to be made thereon in good and

Appeal. 1916. SAUNDERS v. HAMILTON.

sufficient order, repair, and condition. In the lease the demised premises are called that part of the lands called Spittal lands formerly in the tenancy and possession of Mr. Robert Hewson, and lately in the tenancy of Mr. William Daly, containing 10A. 2R. 17P., situate in the parish of Saint Nicholas, and county of Cork.

There is no reference in the lease by name to any buildings in the demised premises. In 1867 the lessee's interest, subject to sub-leases of parts of the holding, was assigned to Thomas Rogers of Russell Lane, in the city of Cork, gardener. In 1888 the said Thomas Rogers, therein described as a market-gardener, and the representatives of a man named White, who had been sub-lessee of portion of the premises, and whose term was still subsisting, assigned the holding to David Saunders, therein described as a nurseryman. The existing tenant is the widow of David Saunders, who died in 1902, and was succeeded by her. I understand that the term in the lease of 1851 had expired, and that the lessee had remained on as a yearly tenant. On the holding there is a two-story, slated dwelling-house, known as Linden Lodge, which is sub-let on a monthly tenancy, with a small adjoining garden, at £26 a year. There are also on the holding three labourers' cottages, which are sub-let on weekly tenancies to three labourers, who are in the employment of the tenant, and who work for her on the holding, and on other adjacent holdings in her occupation. Linden Lodge was rebuilt by the lessee about twenty-six years ago at a cost of about £300, and has been sub-let ever since. I understand there was an old cottage there before which was smaller, and not in good repair, and it was never let. The materials of the old cottage were used in the building of Linden Lodge on the same site. The assessor reports there are no signs of the old cottage. The three labourers' cottages were in existence before the lease of 1851, but the tenant alleged an expenditure of £25 on one of the cottages on a new roof.

The existing tenant, and her husband during his life, carried on the business of a nurseryman and market-gardener on the holding before the Court, and upon adjoining holdings, and holdings in the immediate neighbourhood. [His Lordship referred to the particulars of these holdings.] Of the holding

before the Court, about three-fourths are used as a market-garden and one-fourth as nursery-ground, and the holdings are occupied as before stated. The tenant herself lives a little nearer the city, on a holding which is two roods and two perches in area, and consists of a two-storied, slated residence and garden. [His Lordship, having stated the facts as above set forth, proceeded.]

Fair rents have undoubtedly been fixed upon market-gardens adjoining Cork city and in this neighbourhood; that is to say, where the cottage of the market-gardener was in what might be almost termed a street, with the market-garden behind the cottage. There have been very few, if any, town-parks established round Cork. It is the same in all big cities. The facilities provided by shops for milk and vegetables lessen very much the demand for accommodation land, which is much greater amongst the inhabitants of smaller towns where these facilities do not exist. I am inclined to think that the holding is substantially agricultural or pastoral, for the greater part of it is used as a market-garden---only about one-fourth of it being used as a nursery.

The area of the land sub-let with Linden Lodge was very small, and Linden Lodge itself I consider a building erected by the tenant, subject to some of the old materials of the former cottage being used; and the tenancy is only a monthly tenancy. The three cottages are occupied by workmen of the tenant, who cultivate the holding, as well as other lands of the tenant. I am, therefore, of opinion that the tenant is in bona fide occupation of the holding within the meaning of the Land Act of 1896, sect. 7.

Then comes the last question, whether the holding is excluded as a town-park. It is, and has been, in the occupation of tenants living in the city of Cork. Robert Searls, the original lessee in the lease of 1851, is described as of Rutland Street, in the city of Cork. Thomas Rogers, who acquired it in 1867, is described as of Russell Lane, in the city of Cork, and subsequently of Greenmount, in the city of Cork. David Saunders and his wife, the existing tenant, lived, and she still lives, in Friar's Walk, which is in the city of Cork. The holding adjoins the city of Cork, part of it being within the urban boundary.

Appeal. 1916.

SAUNDERS *v.* HAMILTON.

In the opinion of the assessor, with which I concur, it bears an increased value as accommodation land over and above the ordinary letting value of land occupied as a farm in proximity to a town. In his opinion, as agricultural land near to a town, it has the value of fifty shillings per statute acre, and, in addition to this, it has accommodation value of £4 5*s.* on the entire 10A. 3R. 30P. Considering its situation, only three-quarters of a mile from the centre of the city of Cork, I think it must have an increased value as accommodation land, although that increased value may be relatively less than the accommodation value in a smaller town where the demand for accommodation land is greater. Therefore, the holding is a town-park within the meaning of the Land Act of 1881. The question then arises: Was it let and used as an ordinary agricultural farm? It was let under the lease of 1851 to a Cork butcher. I have no evidence as to how the butcher used it. But from its situation and size it would be just the plot of land that would be useful to the butcher for the accommodation of his business, and I am prepared to draw the inference that it was let to him for accommodation. Since 1867 it has been occupied by market-gardeners or by market-gardeners and nurserymen, and the house erected sublet as a villa.

Although I cannot say that market-gardens are not agricultural, my opinion is that a market-garden usually is not what is indicated by the term "ordinary agricultural farm"; and certainly nurseries do not come under the term. There was a case of *Tench, Landlord*; *Flanagan, Tenant* (1), decided by the Court of Appeal in April, 1893, which is not reported, but which, as far as my recollection goes, bears out my view that a market-garden is not "an ordinary agricultural farm." The holding was quite close to the city of Dublin, and was used as a market-garden. The application to fix a fair rent was dismissed by the Land Commission, upon the ground that the holding was a town-park, and on appeal to the Court of Appeal the dismiss was affirmed, as well as I recollect, upon the ground that a market-garden is not an ordinary agricultural farm. I do not cite this as an authority, as it only depends on my recollection; and I have come to the conclusion independently of it that a market-garden does not answer

(1) Unreported.

to the term "ordinary agricultural farm," used in the 9th section of the Act of 1887.

It was not stated at what date the lease of 1851 came to an end, but I do not think that makes any difference. If it was let as accommodation land by the lease, and if the lessee continued on as a yearly tenant after the expiration of the lease, it must have been on the terms and for the purposes in the lease. Therefore, I must dismiss the tenant's application to fix a fair rent.

The tenant appealed to the Court of Appeal.

Serjeant Sullivan K.C. and *John F. Moriarty*, for the appellants:—

A nursery is clearly agricultural land. The question of the holding being a town-park was not raised in the Court below. The case was argued on the basis that the holding was a "non-agricultural holding." As to the question of this being accommodation land, it is sought to substitute the report of the assessor for evidence given in Court. The question in such a case is whether persons living in the town would, by reason of their residence, be willing to give a larger rent than, say, a farmer immediately adjoining the holding, but not residing in the town, and not desiring to use the land as accommodation land in connexion with a town holding. See per Porter M.R.: *M'Cann* v. *Downshire* (1). This must be shown by affirmative evidence. They also referred to *Butterly* v. *Carroll* (2) as showing what constituted an agricultural holding.

P. D. Fleming K.C. and *Norwood K.C.* (with them *Hungerford*), for the respondent:—

The holding is not either agricultural or pastoral within the meaning of the Land Act of 1896. If it is agricultural, it comes within the definition of a "town-park." It was let to a tenant, a butcher, who lived in the City of Cork. The assignees of the tenant, including the present tenant, a nursery-man, all resided in

(1) [1894] 2 I. R. 611, at p. 626.

(2) 34 I. L. T. R. 31, at pp. 32 and 141.

Appeal. 1916. SAUNDERS v. HAMILTON.

the city of Cork. The holding itself is near the city, the greater part being within the city boundary. It has an increased value as accommodation land, over and above ordinary proximity value, and therefore comes within the definition of town-park established by the authorities: *Killeen* v. *Lambert* (1); *Christy* v. *Gordon* (2). The assessor's report ascertains that it does bear an increased value as accommodation land. The assessor's report is prima facie evidence against the parties. If there is a town, that shows prima facie that there is proximity value.

This is a nursery, not a farm; the tenant is a nursery-man. The holding was not let and used as an ordinary agricultural farm within the meaning of sect. 9 of the Land Act of 1887. Horticulture differs from agriculture: *Perry* v. *Farley* (3).

Serjeant Sullivan, in reply:—

The only things within the power of a valuer are those things within his competence as such. The assessor must get the evidence in court before he goes out.

[He referred to *Earl of Gosford* v. *Blair* (4).]

SIR IGNATIUS J. O'BRIEN C.:—

I am forced by the position of the case to express a view on one general question which was raised. It has reference to the position and powers of an assessor.

The holding, consisting of 10A. 3R. 20P., forms part of Saunders' Nursery, Prior's Walk, very near Cork. The respondent contended that being a nursery it was, therefore, excluded from the purview of the Land Acts. The grounds on which this argument is based, when examined, are inconclusive. I asked counsel what was the essential difference between a nursery and an ordinary agricultural holding. He said; first, because you grow flowers, &c., in a nursery, it differs from an ordinary agricultural farm on which cabbages are grown; secondly, because young trees are raised in it. The view of the judge, who has had great experience in such matters, is that it is substantially agricultural or pastoral.

(1) 10 L. R. Ir. 362.
(2) 13 I. L. T. R. 79.
(3) [1894] 2 I. R. 579, at p. 584.
(4) [1899] 2 I. R. 453.

Appeal. 1916.

SAUNDERS v. HAMILTON.

Sir Ignatius J. O'Brien C.

The only place in the Land Acts where the expression "ordinary agricultural farm" is used is in section 9, Land Act, 1887. That, far from assisting the argument, tends in my view the other way. How anything which is a nursery is to be held non-agricultural I cannot comprehend. The judgment of FitzGibbon L.J. in *Perry* v. *Farley* (1) does not help in distinguishing between horticultural and agricultural. I do not take his judgment as suggesting that growing of flowers, &c., is less agricultural than growing vegetables, and I cannot yield to any such view of the case. I, therefore, come to the material question argued before us. Though land by reason of proximity to a town bears an increased value, it does not necessarily bear an increased value as accommodation land. Here no evidence was given, either before the sub-commission or the head commission, that this plot of land bears an increased value as accommodation land over and above the ordinary letting value of the land occupied as a farm. Now Commissioner FitzGerald sat in this case with an assessor under the powers given by sect. 88, sub-sect. 2, Land Act, 1903 [reads section]. The assessor hears the evidence given in Court before the judicial commissioner and himself. The assessor may inspect the holding, if required by the parties, and report thereon to the commissioner in the prescribed manner. There are rules and a form under sect. 89 (see Rules of 7th November, 1903, and Form A) which provide that the assessor shall hear the evidence, which is obviously the evidence given before the commissioner and assessor sitting together. The form in general use recites the circumstances in which he makes his report. The assessor having heard the evidence is to report upon the holding, &c. There is nothing in the form as to accommodation value. This being essentially a matter of evidence, is he entitled behind the backs of the parties to take evidence and give a report thereon? I say emphatically, no. He has no such power under the Act. Can he then give evidence himself? No. In this case the only place where I find any evidence of accommodation value is in the assessor's report, which is only his own view, and has no force or effect unless based on evidence at which we can look. I must assume he had no other evidence except what he heard in Court; and there being

(1) [1894] 2 I. R. 579.

Appeal. 1916.

SAUNDERS v. HAMILTON.

Sir Ignatius J. O'Brien C.

none in the note before us, it follows that he has reported on evidence which he has himself taken, and which has no force whatever. If in the present case the report is to have effect, it must have a conclusive effect. The assessor says the holding has an accommodation value to the amount of £4 5*s.* on the entire ten acres; therefore the holding is a town-park. To say that this report could be taken into account as determining the question would be unfair, and is not contemplated by the statute. This being an agricultural holding, and there being no evidence on which we can hold it was excluded as town-park, it must go back to the commissioner to fix a fair rent.

RONAN L.J.:—

I agree with FitzGerald J. that this holding is not excluded from the Act on the ground that it "is not substantially either agricultural or pastoral in its character." I adopt his view that it is substantially agricultural. I agree that, though agricultural in its character, it is not "let and used as an ordinary agricultural farm" within the meaning of sect. 9 of the Act of 1887, so as to take it out of the exclusion from the Act contained in sect. 58, sub-s. 2, of the Act of 1881.

The only remaining question is, whether it is within the terms of sect. 58, sub-s. 2; and this is narrowed down to the point, "Does the holding bear an increased value as accommodation land over and above the ordinary letting-value of the land occupied as a farm?" Is there any or sufficient evidence that it does bear such increased value? My colleagues have arrived at a clear conclusion on this question, so that my opinion is immaterial. I shall only say that, before giving an opinion, I should like to have a further opportunity of considering the effect of the judgments in *Killeen* v. *Lambert* (1) and *Christy* v. *Gordon* (2), therein referred to, and also the question, how far the report of the assessor can be used as a substitute for, or in addition to, the evidence taken in Court.

I think the parties should not be exposed to the delay and expense caused by a postponement of the judgment in the case.

(1) 10 L. R. Ir. 342. (2) 13 I. L T. R. 79.

MOLONY L.J.:-

I agree in the judgment of FitzGerald J. that the holding is substantially agricultural or pastoral, and that the tenant is in bona fide occupation; but I think there was no evidence to justify his finding that the holding is a town-park. The onus lay upon the landlord of proving that the holding bore an increased value as accommodation land over and above its ordinary letting-value as a farm; but no evidence was given on the subject at the hearing, and, indeed, the word "town-park" was never mentioned. In *M'Cann* v. *Downshire* (1) the landlord offered no evidence that the holding bore an increased value as accommodation land, save a general statement to that effect by the agent, and this Court unanimously held that the landlord had not discharged the onus cast on him.

It is admitted that this case is ruled by *M'Cann* v. *Downshire* (1), unless FitzGerald J. is entitled to rely on the assessor's report as evidence of the fact that the holding has an increased value as accommodation land.

This leads us to consider what are the respective duties of the judge and the assessor on the hearing of fair-rent appeals. Sect. 88, sub-s. 2, of the Irish Land Act, 1903, provides that such appeals shall be heard and determined by one "judicial commissioner," with the assistance of one specially qualified lay assessor, who shall hear the evidence, and, on the application of either of the parties, inspect the holding, and report thereon to the judicial commissioner in the prescribed manner." The general order of the 7th November, 1903, prescribes in clear language the duties of the assessor: "He shall hear the evidence, and for the purpose of aiding the judicial commissioner before whom a case is heard, in hearing and determining the same, shall, to the best of his skill, experience, and ability, answer any question which may be put to him by the judicial commissioner relative to any question arising upon the facts of the case; and shall, upon application of either of the parties, or if so directed by the judicial commissioner, inspect the holding, and report thereon to the judicial commissioner in Form A, with such variations as the

(1) [1894] 2 I.R. 611.

Appeal. 1916.

SAUNDERS v. HAMILTON.

Molony L.J.

circumstances of the case may require and the judicial commissioner may direct."

The assessor is to aid the judicial commissioner by answering any question "arising upon the facts of the case," but he is not called on to pronounce an opinion on a question of fact, which must be proved by evidence, and in regard to which no evidence has been given. The assessor, having heard the evidence, goes out to inspect the holding. It is perfectly clear he has no power to administer an oath or to hear evidence there. He is to be accompanied by a person on behalf of the landlord and by a person on behalf of the tenant. He observes what they point out, and he uses his eyes; but he is not to take evidence. This is clear from the first words in Form A of the assessor's report [reads]: "The assessor, having heard the evidence, is to report upon the holding by answering such of the following queries as the judicial commissioner may direct."

There is no trace in the form that the question of accommodation value is to be considered by him. The form requires him, in stating the annual sum which should be the fair rent of the holding, to specify inter alia "any additions for proximity, if same have not already been taken into consideration in the rate per acre," and it has been suggested that if the assessor has to consider the question of proximity he must also consider the question of accommodation value. It is clear, however, as was pointed out by Walker C. in *M'Cann* v. *Downshire* (1), that while there can be no accommodation value without including proximity, the converse is not true. The ordinary letting value of a farm includes its "proximity value"; but the assessor having considered the question of proximity in arriving at the acreable rent, expresses an opinion that the holding bears an increased value as accommodation land, and adds to the acreable rent the sum of £4 5*s.* in respect of such value.

In my opinion the assessor is not entitled in the absence of evidence to come to any such decision. If there had been evidence at the hearing, the assessor could be asked for his opinion. Here we are asked to hold, when no evidence was given at the hearing of a matter which can only be determined by evidence, that an

(1) [1894] 2 I. R. 611.

assessor is entitled to put in his report an opinion that the holding bears an increased value as accommodation land, and that on that opinion the judge can say it is town-park. To do so would go far beyond any previous decision; and as there is no evidence on which the judicial commissioner could find that the holding was a town-park, we must remit the case to him to fix a fair rent.

Solicitors for the appellant: *P. W. Bass & Co.*
Solicitors for the tenant respondent: *T. R. Wright & Son.*

A. E. C.

M. R.
1916.

Nov. 2.
Dec. 7.

FITZPATRICK *v.* WARREN.

(1916. No. 645.)

Renewable Leasehold Conversion Act, 1849 (12 & 13 *Vict. c.* 105)—*Renewal Fines—Lease for Lives Renewable for Ever—Landed Estates Court Conveyance—Indemnity against "Rent"—Liability of Indemnified Lands to Contribute—Renewal Fines—Fee Farm Rent.*

The lands of D. and K., held under a lease for lives renewable for ever, dated the 10th October, 1694, subject to the yearly rent of £15, late Irish currency, with a covenant by the lessor for perpetual renewal on payment by the lessee of one half year's rent as a renewal fine on the fall of each life, were sold by the order of the Incumbered Estates Court, Ireland, in two lots, in the year 1858.

By Incumbered Estates Court conveyance, dated the 17th July, 1858, reciting the lease, and the last renewal thereof, dated the 1st April, 1844, the lands of D. were conveyed, subject to the rent reserved by the lease, and bound to indemnify all other lands charged with the said rent from the same.

The other lands, viz., the lands of K., were conveyed by a similar conveyance, made by the Landed Estates Court, dated the 16th July, 1859, subject to the rent reserved by the lease, but indemnified against the payment of the said rent, and the costs and expenses occasioned by nonpayment thereof, by the lands of D., which had been sold subject and liable thereto, in full exoneration of all other lands charged therewith. There was no renewal of the lease since 1844, though all the lives had dropped.

The owner of the reversion expectant on the lease having called upon the owners of the lease to take out a fee-farm grant pursuant to the Renewable Leasehold Conversion Act, the plaintiff, as owner of the lands of D., claimed a contribution from the defendant, as owner of the lands of K. proportionate to their value towards payment of the septennial fines and the addition to the fee-farm rent representing the annual value of the renewal fines. The defendant contended that he was indemnified against all liability by the terms of the conveyance of the 16th July, 1859, made to his predecessor in title.

Held, that the lands of D. were bound to indemnify the lands of K. from payment of a proportionate part of the half year's rent, payable as a renewal fine on the fall of each life in the lease and the renewals thereof, and against payment of a proportionate part of the increase of the yearly rent reserved by the lease occasioned by the conversion into a fee-farm grant pursuant to the Renewable Leasehold Conversion Act.

ORIGINATING SUMMONS.

This was a summons taken out by agreement between the parties to determine as to the liability, if any, of the defendant to contribute towards payment of the septennial fines and the increase of rent payable on the taking out of a fee-farm grant of the lands comprised in a lease for lives renewable for ever.

The following statement of the facts is taken from the judgment of O'Connor M.R.:—

"Certain lands called Drumbartagh and Killagh, otherwise Keelagh, situate in the county of Cavan, were held under a lease for lives renewable for ever, dated the 10th October, 1694, subject to the yearly rent of £15, late Irish currency. The lease contained a covenant by the lessor for perpetual renewal by substituting another life or lives for any life or lives falling in on payment by the lessee of one half year's rent as a renewal fine on the fall of each life.

"The lands comprised in the lease were sold by order of the Incumbered Estates Court in two lots, Drumbartagh forming one lot and Killagh the other lot.

"By Incumbered Estates Court conveyance, dated 17th July, 1858, reciting the lease, and that the last renewal thereof was made by indenture, dated the 1st April, 1844, for the lives of Her late Majesty Queen Victoria, Prince George (Duke of Cumberland), and His late Majesty King Edward, then Prince of Wales, it was witnessed that the Commissioners for Sale of Incumbered Estates in Ireland granted to Patrick Fitzpatrick and Mathew Kearns the lands of Drumbartagh (portion of the lands comprised in the lease), to hold to them, their heirs, and assigns as tenants in common, for the lives named in the renewal, and the survivors and survivor of them, and the lives of such other persons as should from time to time for ever thereafter be added, pursuant to the covenant for perpetual renewal contained in the lease, subject to the payment of the rent reserved by the said lease, and bound to indemnify all other lands charged with the said rent from the same.

"The other lands which were thus indemnified were the lands of Killagh.

M. R. 1916.

FITZPATRICK v. WARREN.

"By a similar conveyance made by the Landed Estates Court, dated the 16th July, 1859, the lands of Killagh were conveyed to Frederick A. Carroll, his heirs, and assigns for the same lives and all other lives to be added in pursuance of the covenant for perpetual renewal, subject to the payment of the rent reserved by the lease, but indemnified against the payment of the said rent and against all costs and expenses occasioned by the non-payment thereof by the lands of Drumbartagh, which were sold by the Commissioners, subject and liable thereto, in full exoneration of all other lands charged therewith.

"The estate of the grantees in the first-mentioned conveyance is now vested in the plaintiffs, Daniel Fitzpatrick and Charles Fitzpatrick, and the estate of the grantee in the secondly mentioned conveyance is now vested in the defendant Emily Louisa Warren, so that the plaintiffs represent the indemnifying lands, and the defendant the indemnified lands.

"There has not been any renewal of the lease since 1844, although the lives have long since dropped. Lately the owner of the reversion expectant on the lease for lives renewable for ever has called upon the plaintiffs and defendants to take out a fee-farm grant of the lands under the Renewable Leasehold Conversion Act, which they have agreed, and are indeed bound to do, at the risk of forfeiting their estates. This necessitated a computation of septennial fines now payable, and a calculation of the annual value of the future renewal fines, with a view to the computation of the rent to be payable under the fee-farm grant. The fee-farm grant would be made up of the rent reserved by the lease plus the annual value of the renewal fines. The septennial fines now payable amount to about £100."

The Landed Estates Court conveyance of July 16th, 1859, was in the words and figures following:—

Whereas by an indenture of lease dated the 10th day of October 1694 and made between Robert Saunderson of Castle-Saunderson in the County of Cavan of the one part and Alexander Martin of Drumbartagh in the parish of Belturbet alias Annagh in the said county of the other part the said Robert Saunderson did demise unto the said Alexander Martin (amongst other hereditaments) the several number of acres of

land in the respective poles of land as follows viz.—in the pole of Keelagh 71 acres and 39 and a half perches in the pole of Corcraff 17 acres and 20 perches and in the lands of Drumbartagh 61 acres and 1 rood all Irish plantation measure as the same were then in the possession of the said Alexander Martin situate in the barony of Tullygarvey parish of Belturbet alias Annagh in the County of Cavan aforesaid to hold the same to the said Alexander Martin his heirs executors administrators and assigns from the first day of May then last past for the lives of the three cestui qui vies therein named and for the survivors and survivor of them and for the lives of such persons as should from time to time for ever thereafter be added pursuant to the covenant for perpetual renewal thereinafter contained at the yearly rent of £15 late currency (equivalent to £13 16*s.* 11*d.* sterling) payable half yearly on every 1st day of May and 1st day of November in each year over and above quit rent And the said indenture contained a covenant on the part of the said Alexander Saunderson for perpetual renewal of the said lease on payment of one half years rent on the fall of each life And whereas the last renewal of the said lease was made by an indenture which bears date the first day of April 1844 and made between Alexander Saunderson of the one part and Samuel Martin of the other part and such renewal is for the lives of Her present Majesty Queen Victoria Prince George King of Hanover and His Royal Highness Albert Edward Prince of Wales and the survivor of them Now I, Mountifort Longfield LL.D. one of the judges of the Landed Estates Court Ireland under the authority of an Act passed in the 22nd year of the reign of Queen Victoria intituled "An Act to facilitate the Sale and Transfer of Land in Ireland" in consideration of the sum of One hundred and seventeen pounds ten shillings by Frederick A. Carroll of Burlington Road in the County of Dublin Esquire paid into the Bank of Ireland to the Account of the Landed Estates Court to the credit of the Estate of Samuel Martin and Alexander Martin owners and petitioners do grant unto the said Frederick A. Carroll the said premises in the pole of Keelagh barony of Tullygarvey parish of Belturbet alias Annagh being the hereditaments expressed to be demised by the said indenture of the 10th day of October 1694 to hold the same unto

M. R. 1916. FITZPATRICK v. WARREN.

the said Frederick A. Carroll his heirs and assigns for the lives of Her Majesty Queen Victoria His Majesty the King of Hanover and His Royal Highness Albert Edward Prince of Wales and the survivors and survivor of them and for the lives of all such other persons as shall for ever hereafter be added pursuant to the aforesaid covenant for perpetual renewal subject to the payment of the rent reserved by the said lease and to the performance of the covenants and agreements on the lessee's part therein contained but indemnified against the payment of the said rent and against all costs and expenses occasioned by the non-payment thereof by the lands of Corcraff and Drumbartagh situate in the barony of Tullygarvey and County of Cavan and containing 129 acres 1 rood and 15 perches statute measure which have been sold by the Commissioners for Sale of Incumbered Estates subject and liable thereto in full exoneration of all other lands charged therewith and subject to the tenancy of Thomas Frederick Knipe under a certain indenture dated the 24th March 1859 being a conveyance under the Renewable Leasehold Conversion Act in lieu of a certain agreement for a lease for lives renewable for ever dated the 2nd May 1711 and made between Alexander Martin of the one part and John Campbell of the other part and subject to all rights of common rights of way and other easements if any which now exist in or over the premises hereby granted in witness whereof I the said Mountifort Longfield have hereunto set my hand and seal of the said Court this 16th day of July in the year of Our Lord 1859.

Lardner, for the plaintiff:—

The indemnity given by the conveyance of lands owned by the defendant is only against payment of the rent reserved by the lease. Renewal fines should have been mentioned if it was intended that the indemnity should extend to them. The words of the deed of 1859 are "indemnified against the said rent." The words of the deed of 1858 are "subject to the payment of the rent reserved by the said lease and bound to indemnify all other lands charged with the said rent from the same and also subject to the performance of the covenants and agreements on the lessee's part therein contained so far as same relate to the

lands hereby conveyed." The circumstance that the renewal fine is fixed at a half year's rent does not extend the indemnity against the rent to renewal fines. The rent is recoverable by distress; the fine cannot be so recovered. The renewal of the lease was optional on the part of the lessee, and the fine was only payable if the lessee chose to renew. The defendant is liable also to pay a proportion of the increase of the rent reserved by the lease occasioned on the conversion of the lease into a fee-farm grant under the provisions of the Renewable Leasehold Conversion Act. [O'Connor M.R.: You will have to pay the increased rent; it is rent made up of the original rent and the estimated annual value of the renewal fines.]

Price, for the defendant:—

The Renewable Leasehold Conversion Act was in force when the conveyances of 1858 and 1859 were executed, and the parties could have taken advantage of that Act. I take it that all past renewal fines were wiped out when the conveyance of 1858 was made, and the purchaser could have compounded for fines, and turned the lease into a fee-farm grant. If the purchaser had done that, he would have had to pay a larger rent, whereas he has paid the old rent with a liability to pay fines. The deed of 1859 is the deed the Court has to construe. The indemnity given by the statutory conveyance is equivalent to a covenant to indemnify against the rent. If there is any ambiguity, the covenant must be construed against the covenantor. The word "fine" does not occur in our deed. The lands comprised in the lease are recited to have been demised at the yearly rent of £15, late currency (equivalent to £13 16*s.* 11*d.* sterling), and it is recited that the lease contained a covenant on the part of the lessor for perpetual renewal "on payment of one half year's rent on the fall of each life." The conveyance contemplated the grant of a perpetual interest. The word "rent" has the same meaning throughout. The terms of the lease are recited in the conveyance, and the lease cannot be looked at if it is in conflict with the conveyance: *Oliver* v. *Rooney* (1). The defendant's deed is the later

(1) [1895] 2 I. R. 660.

M. R. 1916. FITZPATRICK *v.* WARREN.

deed; the purchase-money of his lot was only £117 10*s.*, and that of the plaintiff's lot £2010. The intention was that all the liabilities should be borne by the other lot. It was never intended that the fines should be apportioned according to the value of the lands. If the purchaser of one lot was to remain liable to payment of renewal fines, that would have been mentioned in the conveyance. It was not anticipated that the lease would be allowed to drop, and it was possible to convert it into a fee-farm grant the very next day. The plaintiff is not to be in a better position because he has not converted it.

O'CONNOR M.R. reserved judgment.

Dec. 7.

O'CONNOR M.R., after stating the facts of the case as above, proceeded as follows:—

A novel question arises in this case.

The plaintiffs say that the defendant is bound to contribute a sum proportionate to the value of Killagh, while the defendant says that he is indemnified by the conveyance to his predecessors in title against all liability in respect thereof. This is the only dispute between the parties. The question turns on the construction of the Landed Estates Court conveyance of Killagh, and the plaintiffs say that the indemnity therein contained is only against the payment of the rent, and that this does not include the payment of the renewal fines payable on each renewal. A renewal fine is not rent properly so called. It has none of the attributes of rent. It cannot be distrained for. There is no right of action for its recovery. The payment of it is only made a condition to the grant of the renewal. This is in favour of the construction which limits the indemnity to the annual rent, excluding the renewal fine. On the other hand, the conveyance may fairly and indeed would be read as a conveyance of an estate in quasi fee free from all liability. A grantee under such a conveyance would certainly suffer a shock on being told that, although he got a conveyance indemnifying him from all rent, he could not renew without paying a half year's rent, or a portion of it. This view of the case might not, however, be sufficient to

support the construction which would give the grantee of Killagh indemnity against the renewal fines.

The recital in the conveyance of these lands does not describe the renewal fines as a fine, but as a "half year's rent on the fall of each life," and the conveyance is made "indemnified against the payment of the said rent." This must include everything before described as rent. It is on the conveyance of Killagh that the right of the grantee thereof to indemnity depended.

There is another consideration which confirms my opinion that the indemnity includes all liability in respect of renewal fines. If it is to be confined to the rent reserved by the renewable lease, it will not cover the entire of the rent of the fee-farm grant about to be made, because the fee-farm rent will be made up of (1) the rent reserved by the lease, and (2) the computed annual value of the renewal fines. It is stated that the annual value of the renewal fines has been computed at 5*s.* 6½*d.*, so that if the grantee of Killagh was not indemnified against renewal fines, but only against the rent reserved by the lease, the liabilities of the respective owners of Drumbartagh and Killagh in future would be as follows:—The owner of Drumbartagh should pay so much of the fee-farm rent as is made up of the original rent and a proportionate part of the 5*s.* 6½*d.*, and the owner of Killagh should pay a proportionate part (almost infinitesimal) of the 5*s.* 6½*d.* This, certainly, was never intended. Further, it is to be borne in mind that the Commissioners of Incumbered Estates, as well as the Landed Estates Court, had a power to apportion charges; and if it was intended that there should be any apportionment of liability between the lands of Drumbartagh, which were sold by the commissioners, and the lands of Killagh, subsequently sold by the Landed Estates Court, an apportionment would have been made. This consideration ought not, I think, to affect the construction of the conveyances, but, reading them by themselves, and construing them without any external aid in the way I have done, I think it is satisfactory to show that if it was intended to have an apportionment of charges, there was power to provide for it.

M. R.
1916.

FITZPATRICK
v.
WARREN.

The judge made the following order :—

The judge doth declare that on the true construction of the said conveyance of the 16th day of July, 1859, the lands of Corcraff and Drumbartagh in the said conveyance of the 17th day of July, 1858, mentioned and conveyed, are bound to indemnify all other lands charged with the rent reserved by an indenture of lease for lives renewable for ever, dated the 10th day of October, 1694, in the affidavit of David Fitzpatrick mentioned, and especially the lands of Killagh, otherwise Keelagh, in the said conveyance of the 16th day of July, 1859, mentioned and conveyed from payment of a proportionate part of the half-year's rent payable as a renewal fine on the fall of each life in the said lease and the renewals thereof, and also against payment of a proportionate part of the increase of the yearly rent reserved by the said indenture of lease occasioned by the conversion of the said lease for lives renewable for ever into a fee-farm grant under the provisions of the Renewable Leasehold Conversion Act. And the judge doth order that the costs of the conversion of the said lease for lives renewable for ever into a fee-farm grant under the provisions of the Renewable Leasehold Conversion Act be borne by the plaintiffs and the defendant in the proportion of the poor law valuation of their respective lands, and doth order that the parties abide their respective costs of this application and order, and the judge doth certify for counsel.

Solicitor for the plaintiffs : *Henry Murphy.*
Solicitor for the defendant : *Quintin W. Kennedy.*

W. L.

In re HOLMES, Deceased.
VILLIERS *v.* HOLMES.

Barton J.
1917.
Jan. 22, 31.

Will—Construction—"My Shares"—Interest of Next-of-kin in Shares of Deceased Intestate.

A testatrix made a bequest of "my shares in different securities."

Held, that the testatrix's interest, as one of the next-of-kin of a deceased intestate, in certain shares and stock, which formed part of the unadministered estate of the intestate, did not pass under the bequest.

Vanneck v. *Benham*, [1917] 1 Ch. 60, applied.

Originating Summons.

The testatrix, Anne Sibella Holmes, died on the 25th April, 1916. By her last will, dated the 9th August, 1911, the testatrix appointed executors, and directed her debts, funeral and testamentary expenses, to be paid as soon as possible after her decease. The will proceeded:—"I give and bequeath unto my nephew, Dr. Reginald Holmes, my Dunlop Pneumatic Tyre shares in the preference, ordinary, and deferred; and to my brother John, in trust for his children by his wife Sarah, my other shares in different securities for the benefit and education of his children. Out of said shares or cash I wish my brother John to get £100 to pay mortgage off his property."

The assets of the testatrix consisted of money in bank, shares in various companies, and one-third share of the personal estate of Reginald Holmes, who died intestate and unmarried, on the 26th March, 1916, leaving property consisting, inter alia, of stocks and shares in limited companies. The testatrix was at her death entitled, as one of the next-of-kin of Reginald Holmes, to one-third share of his unadministered estate.

The executor brought the present summons for the decision of the following, among other questions arising on the will:—"Did one-third of Reginald Holmes's investments, to which the testatrix became entitled as one of his next-of-kin, pass under the bequest in her will to John Holmes in trust for his children?"

Barton J. 1917.

VILLIERS v. HOLMES.

R. F. Harrison K.C., for the plaintiff:—

The question for decision is, whether the interest of the testatrix, as one of the next-of-kin, in the estate of Reginald Holmes is sufficiently specific to pass under the bequest in the will of "my other shares in different securities." *Cooper* v. *Cooper* (1) decided that the next-of-kin had a specific interest in every item forming the personal estate of the intestate. *Cooper* v. *Cooper* (1) was not cited in *Sudeley* v. *Attorney-General* (2), where it was held that a legatee had not any right to the property in specie, but only to require the personal estate to be administered. In *Blake* v. *Bayne* (3), *Cooper* v. *Cooper* (1) was followed, and *Sudeley* v. *Attorney-General* (2) was not cited. The same remark applies to *Holland* v. *Chambers* (4). *Tevlin* v. *Gilsenan* (5) followed *Cooper* v. *Cooper* (1); *Vanneck* v. *Benham* (6) followed *Sudeley* v. *Attorney-General* (2), and distinguished *Cooper* v. *Cooper* (1).

Gerald FitzGibbon K.C., for the next-of-kin:—

The testatrix plainly never intended by the bequest of her shares in different securities to pass the undivided shares in her nephew's property to which she was entitled as one of his next-of-kin.

H. Wilson K.C., for the children of John G. Holmes:—

In face of the decision of the Irish Court of Appeal in *Tevlin* v. *Gilsenan* (5), and the decision of the Master of the Rolls in *Bradley* v. *Flood* (7), *Vanneck* v. *Benham* (6) is not binding on this Court.

Cur. adv. vult.

Jan. 31.

BARTON J.:—

The testatrix by her will, dated the 9th August, 1911, after giving a legacy of Dunlop Pneumatic shares, proceeded to bequeath "to my brother John in trust for his children . . . my other shares in different securities for the benefit and education of his

(1) L. R. 7 H. L. 53.
(2) [1897] A. C. 11.
(3) [1908] A. C. 371.
(4) [1894] 2 I. R. 442.
(5) [1902] 1 I. R. 514.
(6) [1917] 1 Ch. 60.
(7) 16 Ir. Ch. R. 236.

children." On the 20th March, 1916, a nephew of testatrix died intestate, leaving an estate which comprised a number of shares in railway and trading companies. The testatrix was one of his three next-of-kin. Before administration had been taken out to him, and while his estate remained unadministered, the testatrix herself died on the 26th April, 1916. The principal question for decision is whether the testatrix's undivided interest, as one of the three next-of-kin of her nephew, in the shares which were comprised in his estate, passed under the bequest in her will of "my other shares in different securities."

The nature of the interest of the next-of-kin of an intestate in the items of his estate, and the degree to which that interest can be regarded as specific, have been considered in the House of Lords in *Cooper* v. *Cooper* (1), and in *Sudeley* v. *Attorney-General* (2); and there is an apparent conflict between the language used by some of their Lordships in those two cases respectively. It was, however, pointed out in *Tevlin* v. *Gilsenan* (3), by Lord O'Brien L.C.J., at p. 522, and by FitzGibbon L.J., at p. 530, that the decisions do not conflict; and they were recently reconciled by Younger J. in *Vanneck* v. *Benham* (4).

The interest of a next-of-kin in the unadministered estate of an intestate is a specific interest sub modo. It is sufficiently specific for some purposes, e.g., to be capable of being assigned or of being mortgaged, or of being made the subject of a binding agreement, or of raising a case of election. But it is not sufficiently specific for all purposes. For example, as Younger J. said in *Vanneck* v. *Benham* (4), at p. 76, it "is not sufficiently specific . . . to enable any one of the next-of-kin to say to the administrator, 'This or that thing is mine. Hand it over to me.'" Similarly, in the present case, it would have been a misapplication of words if the testatrix, immediately before her death, had described the shares which were comprised in her nephew's estate, or her interest in them, as "my shares." The question which has been submitted to the Court will be answered in the negative.

Solicitor for all the parties: *Randall A. Howe.*

D. M. S.

(1) L. R. 7 H. L. 53.
(2) [1897] A. C. 11.
(3) [1902] 1 I. R. 514.
(4) [1917] 1 Ch. 60.

Land Judge. 1917.

Feb. 12.

THOMAS M'EVOY, A Registered Owner of Land (1).

Land Registry—Receivership Deed—Registration on Folio—Local Registration of Title (Ireland) Act, 1891 (54 & 55 *Vict. c.* 66), *sect.* 45, *sub-s.* 1 (*e*)—*Rules of* 1910, *Order IV, rule* 20.

A receivership deed should be registered on the folio, as being a burden affecting the registered land.

Appeal from the decision of the Registrar of Titles. Thomas McEvoy was registered as limited owner, subject to equities. On December 1st, 1916, a receivership deed was executed, made between the Provincial Bank of the first part, Thomas McEvoy of the second part, and one Daly of the third part, which provided (inter alia) that out of the profits of the land the principal and interest due to the bank should be paid, and that the surplus profits should be appropriated to this purpose. On the face of the deed the mortgagor covenanted not to obstruct the receiver in the "execution of the trusts." On January 25th, 1917, the Registrar refused to register the deed on the folio, as being contrary to the practice of the office, and on the ground that the deed was a mere agency transaction. From this refusal the Provincial Bank appealed.

Walker K.C., for the Provincial Bank :—

The case comes within sect. 45, sub-s. 1 (*e*), of the Local Registration of Title (Ireland) Act, 1891, apart from which Order IV, r. 20, of the Rules of 1910, confer a general power. As long as there is an appropriation of rents or profits to a particular purpose there is a security. [He cited *Crawford* v. *Lord Annaly* (2).]

Madden J.:—

If it were necessary for me to decide whether a receivership deed such as that which is before me comes within the words "trust for securing money," in the 45th section of the Local Registration of Title Act, I should approach the question with a

(1) Before Madden J.

(2) 27 L. R. Ir. 523.

disposition to give a liberal interpretation to those words, for it is necessary to the satisfactory working of a system of record of title that every interest by which the lands are affected should be noted in the register. The 45th section applies not only to burdens of the specified classes, but to "any such other matter as may be prescribed," and Or. IV., r. 20, of the Land Registry Orders and Rules of 1910 provides that it shall be competent for the registrar to register as burdens affecting the land such matters as, in addition to the burdens specified in sect. 45 of the Act of 1891, may appear to him properly to charge or affect the registered land.

A deed like that in the present case is one which affects land in so far as it affects the receipt of the rents and profits, and I think it should be noted in the register as a deed appointing a receiver over the lands, not as a charge for the amount due on the security on foot of which the receiver has been appointed. The registrar in refusing to note the deed in the register has followed the practice hitherto existing, but I think that the practice should be altered in the manner which I have indicated.

Solicitor for the Provincial Bank: *John Tweedy.*

T. C. T.

Land Judge.
1916.
Nov. 27.

OWEN SMITH.

Folio 5033, County Meath.

Land Registry—Discharge of Equities—Application by Person other than the Registered Owner—Jurisdiction of Registrar—Practice—Substantive Proceedings when proper—Fraud—Mistake—Oral Evidence.

A person whose title to land registered subject to equities arises under instruments executed prior to first registration, is entitled to apply to the registrar to investigate the title, and the registrar has jurisdiction to entertain such an application.

The practice of discharging equities on the application of an interested person other than the registered owner, approved.

The registrar has jurisdiction under sect. 29 of the Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66), to deal with a claim founded on an equity, even though the claim is one which might be made the subject of substantive proceedings in a court of competent jurisdiction. But where the application raises a question of actual fraud or mistake coming within sect. 34, sub-s. 1, of the Act of 1891, the registrar would as of course decline to entertain it.

Where important interests are involved, or it is desirable that evidence should be taken orally, the registrar should adjourn the hearing of the application to discharge equities in order that substantive proceedings may be taken.

Appeal from the decision of the Registrar.

The facts, as stated in the judgment, were as follows:—

Owen Smith was registered as the owner in fee simple of certain lands purchased by him under one of the Land Purchase Acts, which were vested in him on the 1st of May, 1915. The registration was made subject to equities under the provisions of the 29th section of the Local Registration of Title Act. An application was subsequently made by Patrick Smith, requiring the registering authority to investigate the title to the lands, to ascertain and enter on the register the burdens (if any) appearing on such investigation to affect the lands, and to cancel the note as to rights or equities which had been entered on the folio. Patrick

Smith's title arose under a marriage settlement and deed of appointment which had been executed prior to the purchase of the lands, and which affected the leasehold interest that was then vested in Owen Smith. The title under those deeds was, it was contended, an equity to which Owen Smith was bound to give effect out of the fee-simple estate of which he became the owner by virtue of his ownership of the existing tenancy, and which was kept alive by the note under the 29th sect. of the Act.

The registrar held that he had no jurisdiction to entertain the application.

Monroe, for the registered owner and appellant :—

This application is in effect to have a graft declared as against the registered owner. This can only be done by a plenary suit on the equity side of the County Court. The Act does not take away the ordinary Chancery jurisdiction, nor does it give the registrar a concurrent jurisdiction. Sect. 29, sub-s. 4, provides that the registered owner may at any time apply to the registering authority in the prescribed manner to ascertain and enter on the register any burdens the ascertainment of which may have been dispensed with under the provisions of this section, and the registering authority shall thereupon ascertain and enter such burdens on the register, and shall cancel such note as aforesaid, the entry whereof shall thenceforth be of no force or effect. This shows by implication that an application such as this can be made by the registered owner only.

Carrigan K.C., for the respondent :—

Sect. 29, sub-s. 4, of the Act, which permits the registered owner to apply to have burdens ascertained, does not mean that no person but the registered owner can make such an application. The practice of the office is against such a construction. The applicant's interest is a burden, to register which involves the ascertainment of the pre-existing rights subject to which Owen Smith has been registered as owner. A person interested in a burden is entitled to apply to have it registered (sect. 45, sub-s. 2). When the Act intends that the registered owner only can proceed under it, it so provides in terms (sect. 44, sub-s. 1).

Land Judge. 1916. *In re* SMITH.

MADDEN J. :—

[His Lordship, having stated the facts, proceeded as follows :—]

When the application came before the registrar it appeared that two questions were involved in the case—(1) Had the registrar jurisdiction to entertain the application, having regard to the fact that it was made, not by the registered owner, but by another person who claimed to be entitled to an estate or interest in the registered land? (2) Was the claim of Patrick Smith one which could be entertained on an application to the registering authority to cancel a note as to rights and equities which had been made under the 29th section, or one which should have been made the subject of substantive proceedings in a court of competent jurisdiction? The former is the question which was argued before the registrar, and that on which an appeal has been taken from his decision. Both questions were argued before me, and as they are closely connected, this judgment is conversant with both.

The questions involved in this case are of first-class importance in relation to the powers and duties of the registering authority under the 29th section, and for their determination a careful consideration is required of the provisions of the Local Registration of Title Act in view of the state of affairs relating to State-assisted land purchase which existed when it was passed.

The paramount intention of the Legislature was to establish in Ireland a system of Registration of Title, available for all owners of land, but universal and compulsory in the case of tenants who had purchased their holdings under any of the Land Purchase Acts. The necessity of establishing such a system was recognized at an early stage of the development of State-assisted land purchase, for I find in the 14th section of the Land Purchase Act of 1885, as it originally stood in the Statute Book, the following provision :—"The Land Commission shall register in the Registry of Deeds all Vesting Orders and Conveyances executed by them under this Act, and shall transmit copies thereof to the clerk of the peace of the county in which the holding is situated for the purpose of local registration." This provision was repealed by section 52 of the Land Law (Ireland) Act, 1896. It was inoperative from the first, for the simple reason that when the clerk of

the peace had received a copy of the Vesting Order there was no office in which he could register it. However, after the lapse of about six years effect was given to the intention of the Legislature, as declared in the 14th section of the Act of 1885, by the establishment of a system of Local Registration of Title, with special reference to the requirements of tenant purchasers, a class of landowners who would have become involved in an expense in most cases altogether disproportionate to the values of their holdings, if the conversion of their interests into estates in fee-simple had the consequence of bringing them within the operation of the Acts relating to the Registry of Deeds. Tenancies from year to year and short leases were exempted from the operation of those Acts, and the entry of tenancies in the landlord's book supplied some of the requirements of a system of land registry. The interests of occupying tenants which were exempted from the operation of the Acts relating to the registration of deeds were in many instances of considerable value, and they had frequently become subject to charges and incumbrances of various kinds. The rights legal or equitable which were thus created were not destroyed when the occupying tenant became the owner of the fee-simple of his holding under one of the Land Purchase Acts. Under the equitable doctrine of graft the purchasing tenant could have been compelled to give effect to these rights out of the estate in fee-simple which he had acquired by virtue of his position as tenant in occupation.

The existence of charges and incumbrances of this kind placed great difficulties in the way of applying the principle of compulsion to the new system. Experience in England and Ireland, beginning with Lord Westbury's Act of 1862, had proved compulsion to be a necessary element in a system of land registry which is intended to be universally adopted. The failure of the system of registration of title, established by the Record of Title Act, was largely due to the inadequacy of the method in which this element was introduced into the Act. A conveyance under the Incumbered Estates Act, or Landed Estates Court Act, started the purchaser with a clear and indisputable title, which might have been safeguarded from deterioration through subsequent devolution by registration under the Act. In the Colonies,

Land Judge. 1916. *In re* SMITH. Madden J.

where title to land starts with a clear title under a grant from the Crown, systems of compulsory registration have been established with success. The Irish system of recorded title stopped short of effective compulsory registration; but a step was made in this direction. The Act (28 & 29 Vict. c. 88) recites that it "is expedient that titles conferred by the Landed Estates Court, Ireland, should be kept free from complications, so that subsequent dealings with the estates held under such titles should be more simple and economical." The 7th sect. empowers any person to whom a conveyance or declaration of title shall be given to require within seven days by a document under his hand that the title so conferred should not be recorded. In the absence of such a requisition the title was recorded, as of course. In practice this requisition came to be almost universally lodged, with the result that in the years that intervened between the establishing of the Record of Title in 1865 and its closing in 1891 only 700 titles were permitted to pass into the office, about 15 per cent. of the landed estates conveyances and declarations of title executed during this period.

It was thus apparent that a more drastic form of compulsion was required in order to ensure the general adoption of the system established by the Local Registration Act of 1891. Accordingly, the 22nd sect. enacted that from the commencement of the Act the registration of the ownership of freehold land should be compulsory where in the case of a sale under any of the Purchase of Land (Ireland) Acts the land was subject to a purchase annuity. In all other cases registration under the Act was declared to be voluntary.

Where such a sale had been made before the passing of the Act the Land Commission was empowered by notice in the prescribed manner to require the owner to register his ownership. If the owner did not within the prescribed time make application to be registered, the Land Commission was empowered to make an application for this purpose.

As regards future sales, sect. 23 (1) (*b*) of the Act thus provides:—"Where the sale is made after the commencement of this Act, the Land Commission or the Land Judge, as the case may be, shall forthwith, in order that the purchaser may be registered

under this Act as owner of the land, transmit to the registering authority a notice in the prescribed form; and thereupon such registering authority shall, subject to the provisions of this Act and to general rules, proceed to register the purchaser accordingly." The registration of ownership in the case of future sales being immediate, automatic, and compulsory, it became necessary that some special provision should be made for the ascertainment and registration of the burdens by which the ownership had been affected by reason of the pre-existing tenancy. As I have already stated, the registration of burdens is necessary to a complete register, and in compulsory registration what is compelled is a complete register, including both ownership and burdens. But it was possible while registering the ownership of the land immediately on the sale, to postpone the ascertainment of the burdens, and this, as the lesser of the two evils, was the alternative adopted in the Act. The other alternative was an exhaustive inquiry by the registering authority in each individual case, on the receipt of a notice of sale under sect. 22, into the title of the purchaser to the tenancy of which he had become the owner. To have required such an inquiry in each case would have had the inevitable effect of indefinitely postponing the attainment of the paramount object which the Legislature had in view—the establishment of a general register of the ownership of the land vested in the purchasing tenants.

Accordingly a dispensing power was given to the registering authority in the terms of the 29th section. It is evident from the language of the Act, as well as from the nature of the case, that this dispensing power relates only to first registration. The section is commenced and governed by the words " Before the first registration of any person as owner."

The 29th section applies only to land purchased under any of the provisions of the Purchase of Land (Ireland) Acts. On the first registration of any person as owner of land so purchased, the registrar is bound, if the applicant for registration so requires, to ascertain and enter on the register all burdens affecting the land, except burdens of the class which affect the land independently of registration. Where the applicant has not so required, the registrar may, if he shall think fit, dispense with the ascertainment

Land Judge. 1916. *In re* SMITH. Madden J.

of any burdens affecting the lands which may have arisen in consequence of the pre-existing interest of the purchasing tenant in the land which vested in him upon purchase, either under the application of the equity of graft, or in any other manner. When the registering authority dispenses with the ascertainment of burdens under this section, he must enter on the register a note that the registration is made subject to any rights or equities which may have arisen by reason of the purchaser's previous interest in the land. The effect of this note is to preserve the operation of those rights and equities as affecting the lands, and to place them in the position of burdens to which, though not registered, all registered land is declared by the Act to be subject.

A register of titles, to be complete, should show not only the ownership of the land, but all the burdens with which it is affected, except such as are expressly excepted from the scope and operation of the Act. These burdens are set forth in the 47th section, and the most important are charges and rights of a public nature, easements, profits à prendre, and the rights of occupying tenants.

The effect of the 29th section is to enable the registering authority, if he should think fit, to dispense with the ascertainment of burdens as a condition precedent to first registration in the class of cases to which the section applies, which are cases in which registration is compulsory. The ultimate completion of the register by the ascertainment and registration of burdens is contemplated. This is obligatory on the registering authority when an application to this effect is made by the registered owner (sub-sect. 4). In other cases no statutory obligation is cast upon the registering authority. The completion of the register by the discharge of equities is for the common advantage of all persons interested; but the position of the registered owner is different from that of an applicant who is the owner of a different estate or interest in the registered land. His interest in the land may be too remote or insignificant to entitle him, in the opinion of the registering authority, to impose on the land the burden of an investigation which might be troublesome and expensive. There is nothing in the language of the statute or in the nature of the case to suggest

that none but the registered owner can apply to have the register completed. Certain acts can be done by none but the registered owner, and, in the case of these acts, the statute enacts specifically that "the registered owner of land shall alone be entitled" to do them (sect. 44, sub-s. 1). The compulsory provisions of the statute apply to and embody the entire process of registration, including the ascertainment of burdens; but, in the case of burdens, the registrar has a dispensing power for the purpose of facilitating first registration.

On the first question in the case I am of opinion that the registrar had jurisdiction to entertain the application of Patrick Smith, and to investigate the title to the registered land for the purpose of deciding on his application. A contrary conclusion would narrow the jurisdiction of the registering authority in a manner which would be at variance, not only with the expressed policy of the Act, but with the established and unquestioned practice since the passing of the Local Registration of Title Act.

The system of land registry established in 1891 has been administered under the control of three successive judges by three successive registrars of title. The Act of 1891 is not a statute in the construction of which contemporanea interpretatio can be regarded as a guide. But where a continuous and settled practice has been adopted in carrying out the provisions of an Act of Parliament, it ought not to be disturbed, even though it has not been expressly sanctioned by the statute, unless it can be shown to be inconsistent with its provisions. The practice of discharging equities on the application of an interested person other than the registered owner, not only fully fulfils these conditions, but it is essential to the proper working of the register. Every encouragement should be given, and has been given, to applications for what is known as discharge of equities. The bringing of applications for discharge of equities is a kind of business which is not only of advantage to the profession whose acceptance of the bill of 1891 made it possible to pass it as an unopposed measure, but of advantage to the community, for, as I have already pointed out, a system of land registry which does not disclose on the face of the register burdens as well as ownership falls short of completeness.

Land Judge.
1916.
In re
SMITH.
Madden J.

I have obtained from the Registry Office a return showing the number of applications to discharge equities which were made from the 10th of August, 1915, to the 5th of August, 1916, in sixteen counties, which may be taken as fairly representative for the present purpose, showing the number of applications by persons other than the registered owners. The total number of applications was 260, and in 122 the applicant was not the registered owner. In all these cases the registered owner, if living, had notice of the application. In one case only the application was opposed. This case came before me on appeal from the order of the registrar. I held that the registrar acted within his jurisdiction in entertaining the application, and on the facts brought before me I was of opinion that the question in the case, which was not one of law but of fact, depending on oral testimony, could be best decided in substantive proceedings in the county court. Accordingly, I made an order under which a suit was brought at the Equity side of that Court, the result of which was that the judge of assize on appeal held, reversing the decision of the county court judge, that the registered owner was a trustee for the applicant, and the applicant was registered as full owner accordingly.

I regard this return as satisfactory from two points of view. It affords evidence of the considerable extent to which the temporary defect in our system of land registration, resulting from the operation of sect. 29, is being removed; and I have the satisfaction of knowing that the decision at which I have arrived on the construction of that section has the effect of maintaining a course of practice which has largely contributed to the attainment of this result.

Now arises the second question, as to the course which the registrar should have taken when it appeared that the claim of Patrick Smith was founded on an alleged equity which might have been made the subject of substantive proceedings in a Court of competent jurisdiction. It is contended that when this appeared to be the case the registrar should have refused to proceed further in the matter, and that he should have refused the application, leaving the applicant to take such proceedings as he might be advised to assert his claim to relief in a Court

of Equity. I am of opinion that this contention is not well founded, and that the registrar has jurisdiction under the 29th section to deal with a claim of this kind.

The note which is made on the register under sect. 29, sub-s. 3, is to the effect that the registration is made subject to any "rights or equities" arising from the existence of a previous interest in the purchasing tenant. By "rights" I understand existing estates or interests, legal or equitable; by "equities" claims for the enforcement of which the active intervention of a Court of Equity is required, such as the claim of Patrick Smith in the present case. The "burdens" to which sub-ss. 3 and 4 relate include both "rights" and "equities," and the jurisdiction of the registering authority is the same in regard to both. But his practice in regard to each ought to be, and has been, different. If it should appear upon an application that the case involves a question of actual fraud or mistake coming under the provisions of sub-s. 1 of sect. 34, the registrar would, as of course, decline to entertain the application, leaving it to the applicant, if so advised, to institute substantive proceedings under this section in a Court of competent jurisdiction. If a case of this kind is brought before the judge, he may afford an opportunity to the applicant to institute substantive proceedings under sect. 34, allowing the application to rectify the register to stand over pending the decision of the proceedings so taken. This course has been taken in several cases, one of which is reported: *In re Buckley* (1). If the case appears to be one calling for the action of a Court of Equity on grounds other than those with which sub-s. 1 of sect. 34 is conversant, it may, or may not, be one proper for decision by the registering authority. But this is in each case a question of practice and procedure, not of jurisdiction. In many cases of alleged trusts the parties are satisfied to have the ruling of the registrar, knowing that his decision is subject to appeal to the judge whose decision can be questioned in the Court of Appeal. But if for any reason, either from the importance of the interests involved, or from the desirability of having evidence taken orally, it appears that substantive proceedings should be

(1) [1917] 1 I. R. 47.

Land Judge. 1916. *In re* SMITH. Madden J.

taken, the registrar should adjourn the hearing of the application to discharge equities, in order that such proceedings may be taken. This is the practice that has been followed. Should either party be dissatisfied with the action of the registrar, the matter can be brought before the judge for his directions. In the cases that have hitherto come before me the county court appeared to be the Court of competent jurisdiction in which the proceedings should be taken. But with the extension of the system of land registry, cases will, no doubt, arise in which the property will be outside the limits of the jurisdiction of the county court, and in which substantive proceedings to enforce equitable rights must be taken in the Chancery Division.

In the present case I dismiss the appeal with costs, measured by consent at four guineas.

The application of Patrick Smith will come before the Registrar of Titles, who will deal with it in accordance with the foregoing statement of the principles applicable to such cases.

Solicitor for the registered owner and appellant: *Falls & Co.*
Solicitor for the respondent: *John Clarke & Co.*

T. C. T.

MORGAN, DECEASED.
MORGAN *v.* MORGAN.

M. R.
1917.
Jan. 29.

Infant — Maintenance and Advancement — Reversionary Interest — Sum advanced charged on Corpus — Form of Order.

Where an infant's sole property was a sum of £2500 payable on the death of his father, the Court made an order charging a sum required for his present maintenance and advancement with interest at 6 per cent. on the principal sum, and providing that the sum to be advanced and interest thereon should be repaid only when the principal sum became payable.

SUMMONS.

Charles R. Morgan by his will, dated the 11th February, 1911, bequeathed his residuary personal estate to trustees upon trust (inter alia) to pay to the plaintiff, Patrick Morgan, a legacy of £2500 upon the death of his (the plaintiff's) father. The plaintiff was eighteen years of age, and was desirous of joining the army: his father was unable to contribute to his support, and the legacy of £2500 was the only property to which he was entitled. The present summons was taken out by the plaintiff, by Daniel O'Connell Miley, his next friend, for an order sanctioning a charge by way of advancement and maintenance for the benefit of the plaintiff of £225, with interest at £6 per cent. per annum, upon the interest of the plaintiff in the sum of £2500 under the will of Charles R. Morgan, or, in the alternative, for an order that the defendant, the executor of the will of Charles R. Morgan, might be at liberty to sell so much of the plaintiff's said reversionary interest in the said sum of £2500 as would produce the sum of £225.

Hubert Hamilton (for *J. F. Miley*, serving with His Majesty's Forces), for the plaintiff:—

The plaintiff was in employment at a salary of £2 5s. 0d. a week, but he has now given up his employment in order to do work for the Red Cross. He wishes to obtain a commission in the

M. R. 1917.

MORGAN v. MORGAN.

Royal Flying Corps, but the preliminary training to qualify him for such a commission will last until July next. It is estimated that the sum of £225 is required for his maintenance until July, his equipment, and the costs incidental to this application. The plaintiff's interest in the legacy of £2500 is a vested interest: *Long* v. *Ovenden* (1). In *De Witte* v. *Palin* (2), an order was made charging the reversionary interests of infants with a sum required for their present maintenance. In *In re Tanner* (3), which was a case of an infant contingently interested, Kay J. says (at p. 1110):—"There is no doubt whatever that, where an infant has a vested interest in remainder, the Court has power, where it is for the benefit of the infant, to sanction a charge on that interest." (He also referred to *Fentiman* v. *Fentiman* (4), *In re Howarth* (5), and to Seton's Forms, 6th ed., p. 1010.)

P. A. O'C. White, for the defendant, John L. Morgan, executor of Charles R. Morgan:—

The defendant is willing to advance the sum required on mortgage, at 6 per cent. simple interest, of the plaintiff's interest in the legacy of £2500, principal and interest not to be called in during the life of the plaintiff's father.

O'CONNOR M.R. granted the application.

The following is the curial part of the order made:—

"It is ordered that the defendant, John L. Morgan, be at liberty to advance to the plaintiff through his guardian ad litem, Daniel O'Connell Miley, the said sum of £225, with interest until payment at the rate of 6 per cent. per annum, such sum of £225 and interest thereon from time to time as aforesaid to be only payable to the defendant when the said legacy of £2500 shall become payable. And it is ordered that the same be charged upon the interest of the plaintiff, Patrick Morgan, in the said legacy of £2500 so bequeathed to him by the said will."

Solicitors for the plaintiff: *Miley and Miley.*
Solicitor for the defendant: *Joseph Tierney.*

A. H. W.

(1) 16 Ch. D. 691.
(2) L. R. 14 Eq. 251.
(3) 53 L. J. Ch. 1108.
(4) 13 Sim. 171.
(5) L R. 8 Ch. App. 415.

KELLY *v.* ATTORNEY-GENERAL.

(1916. No. 70.)

M. R.
1916.
July 26.
Nov. 23.

Charity—Gift of Uncertain Amount—Failure of—Gift of Surplus.

Lands were devised to trustees on trust to apply the profit rents for the erection of a parish chapel and parochial house on part of the lands called the chapel field, which was expressly devised on trust for the accommodation of the parish priest forthe time being of the parish of C. and his successors, and when the chapel and house were built, the rest of the lands were to be held upon trust to pay one-half of the profit rents to the parish priest for the time being for masses, and the other half amongst the poor of the parish to be divided amongst them every Christmas by the trustees and the parish priest for ever.

There was no residuary devise in the will. The lands were sold, and the net proceeds, amounting to £1443, were paid to the Commissioners of Charitable Donations and Bequests.

There was no need to erect a parish chapel or parochial house, as there were a parish chapel and parochial house in the immediate neighbourhood.

An originating summons having been taken out by the trustees to determine the construction of the will and the disposal of the fund:

Held, that the gift for masses and for the poor was a devise of the whole, subject to a gift that failed, and not a gift of the residue after a void gift, and accordingly that the whole net proceeds of sale were applicable to these valid charitable objects.

Chapman v. *Brown*, 6 Ves. 404, distinguished, and the principle of that case considered and dissented from.

The following statement of the facts is taken from the judgment of O'Connor M.R.:—

"In this matter the plaintiffs are the trustees of the will of William Thomas Dillon, and they have taken out a summons for the purpose of determining the respective rights of the Attorney-General, representing certain charities under the will, and the testator's heir-at-law, who would become entitled in the event of the failure of the charitable trusts declared by the will. It is uncertain who is the testator's heir-at-law, and accordingly John P. Dillon was appointed to represent him in this proceeding, and he is named as a defendant, along with the Attorney-General.

M. R. 1916.

KELLY *v.* ATTORNEY-GENERAL.

"The testator was at his death entitled to the lands of Togherstown, situate in the county Westmeath, in fee-farm.

"By his will, dated the 13th June, 1870, he devised these lands to his trustees, to hold, in case he died without issue (which event happened), for his wife for her life during widowhood, and subject to that estate upon trust to apply the profit rent arising out of the land for the purpose of providing funds for the erection of a parish chapel and parochial house in that part of Togherstown called the chapel field, which contains about twelve acres, which field he expressly bequeathed to his trustees upon trust for the accommodation of the parish priest for the time being of the parish of Coynra, or Churchtown, and his successors, parish priests thereof, for ever; and, when the chapel and house were built, to hold the rest of the land and house of Togherstown upon trust to be set, and the profit rent to be divided and applied by the trustees of his will in manner following, viz., one half to go to the said parish priest for the time being, and his successors, for offering up weekly masses for the repose of the testator's soul and his wife's soul, and the other half to be divided and expended amongst the poor of the parish every Christmas by the trustees of his will and the said parish priest for ever.

"There was no residuary devise in the will.

"The testator died on the 2nd December, 1870, leaving his wife surviving. She enjoyed the use of the lands during her life, and died on the 5th November, 1912, without having married a second time."

The following additional facts were stated in the affidavit of the plaintiff, J. S. Molloy, in support of the motion filed on the 9th June, 1916:—

The lands of Togherstown were held under a fee-farm grant at an adjusted rent of £63 6*s.* 2*d.* They were sold by the trustees, and the proceeds, £1443, lodged with the Commissioners of Charitable Donations and Bequests. The lands contained in all sixty-nine acres, and the chapel field twelve acres, so that, based on acreage, the proceeds of the sale of the chapel field would be £251. At the time of the testator's death there were already an ample and suitable parish chapel and parochial house within a

quarter of a mile of Togherstown, and the deponent was informed that the bishop of the diocese would not allow another chapel or parochial house to be built on the chapel field. The defendant, Rev. Thomas Donnellan, who was the parish priest of Coynra or Churchtown, was anxious that certain necessary repairs should be done to the existing chapel, and a bathroom and sanitary accommodation built on to the parochial house, and he applied to the Commissioners of Charitable Donations and Bequests to sanction the income of the fund being applied for these objects. After some correspondence had passed between the Rev. Thomas Donnellan and the Commissioners the trustees took the opinion of counsel, who advised that they could not safely deal with the matter except under the direction of the Court. As the heir-at-law of the testator could not as yet be ascertained, it was necessary to appoint some one to represent him.

A summons was accordingly taken out by the trustees, entitled in the matter of the trusts of the will of William Thomas Dillon, and in the matter of 52 Geo. 3, c. 101, for the determination of the following questions:—

Whether, according to the true construction of the said will, and in the events that have happened—

1 (*a*) The portion of the gift for the erection of a chapel and parochial house on the chapel field has totally failed?

(*b*) Or should the portion of the income of the fund now representing Togherstown, which would have been applied to the erection of a chapel and parochial house, be applied cy près?

2 (*a*) Is the chapel field given in any event?

(*b*) Or only as appurtenant to the parochial house to be built on the field?

(*c*) To whom does so much of the proceeds of the sale of the lands of Togherstown as represents the chapel field go, or how can it be applied? And how is it to be ascertained?

3 (*a*) Are the words "and when the chapel and house are built" a condition precedent to the ultimate charitable gift of the profit rent of the rest of the land and house of Togherstown?

(*b*) Does the ultimate charitable gift of the profit rent of the

M. R. 1916.

KELLY v. ATTORNEY-GENERAL.

rest of the lands and house at Togherstown depend on a prior subtraction of the cost of erecting a chapel and a parochial house?

(*c*) If the answers to 1 (*a*) and 3 (*b*) are in the affirmative, to whom does the money which would represent the cost of erecting a chapel and parochial house go, and how is it to be ascertained?

The parties named as defendants in the summons were the Attorney-General for Ireland as representing the charities, James Francis Barrett and Julia Barrett, the personal representatives of the testator, and the Rev. Thomas Donnellan, the parish priest of Coynra. John P. Dillon was afterwards added as defendant to represent the heir-at-law.

Pigot K.C., for the plaintiffs.

Devitt, for the defendant, Rev. Thomas Donnellan:—

The trust for the erection of a chapel and parochial house cannot be carried out in the circumstances; but the rest of the will shows a general charitable intention, which should be carried out either cy près or by applying the whole of the income of the fund, save so much as represents the purchase-money of the chapel field, for the parish priest for masses and for the poor of the parish. He referred to the following cases:—*Attorney-General* v. *The Ironmongers' Company* (1); *Martin* v. *Margham* (2); *Fisk* v. *Attorney-General* (3); *Chamberlain* v. *Brockett* (4); *Re Connolly* (5); *Bird* v. *Lee* (6). The gift of the chapel field to the parish priest does not depend on the building of a chapel and parochial house on that field.

J. H. S. Russell, for the defendant, J. P. Dillon, as representing the heir-at-law:—

There is no general charitable intention here; the trust to build the chapel and parochial house is a particular charitable trust. The bishop of the diocese will not allow another chapel and parochial house to be built. It is decided by numbers of cases that where a testator shows an intention, not of general charity, but merely to benefit some particular charitable

(1) 2 My. & K. 576, 586.
(2) 14 Sim. 230.
(3) 4 Eq. 521.
(4) 8 Ch. 206.
(5) 110 L. T. 688.
(6) [1901] 1 Ch. 715.

institution, or to accomplish some particular charitable purpose, then if by force of circumstances it is impossible to carry out the testator's object, the gift fails, and is not applicable cy près to other charitable purposes. *Attorney-General* v. *Bishop of Oxford* (1); Halsbury's Laws of England, vol. iv, sect. 256, p. 158, and cases mentioned in note (d).

As to the chapel field, this gift must fail, as there is no chapel to be built, i.e., the principal failing the adjunct must fail: *Chapman* v. *Brown* (2).

As the chapel and parochial house cannot be built, it is impossible to say what the building of them would have cost, and therefore it is impossible to say what is to go to the charities; even assuming the cost could have been ascertained, the sum required might and probably would have exhausted the whole. If no existing chapel and parochial house had been close by, it might have been possible—the locality being known and the number of the congregation being known—to form some very rough idea of the probable cost of erecting the chapel and parochial house required for that particular place.

The testator left the rents and profits after the chapel and house had been built to the charities; this cannot be ascertained in accordance with the testator's wishes; therefore the whole gift fails, and the proceeds of sale of the lands go to the testator's heir-at-law: *Chapman* v. *Brown* (2). The principle underlying this rule is that if the whole fund might have been properly applied to the first purpose of building a chapel, there would be no ascertainable residue for the second: Halsbury's Laws of England, vol. iv, sect. 234, p. 149, note (g). *Fisk* v. *Attorney-General* (3) was the case of the repair of a tomb, the cost of which could be ascertained. Wood V.-C. there considered that *Chapman* v. *Brown* (2) had been overruled by the House of Lords in *The Magistrates of Dundee* v. *Morris* (4), but Jessel M.R. in *In re Birkett* (5), which was also the case of a tomb, was of a different opinion. He there says, at p. 579: "I quite agree to this, that if the first object is not so defined that you can reasonably ascertain

(1) 1 Bro. C. C. 444; 4 Ves. 431.
(2) 6 Ves. 404.
(3) 4 Eq. 521.
(4) 3 Macq. 134.
(5) 9 Ch. D. 576.

M. R. 1916. KELLY v. ATTORNEY-GENERAL.

the amount required, the whole must fail, because you might then apply the whole of the gift to the first object; and therefore, if you could apply the whole of the income properly and fairly to the first object, there would, of course, be no ascertainable residue. And that appears to me to have been the case of *Chapman* v. *Brown* (1), which I must say, with the greatest possible deference to three or four judges, does not appear to me to be overruled by the case of *Magistrates of Dundee* v. *Morris*" (2). He then explains why, and states the principle as above given. He, however, followed *Fisk* v. *Attorney-General* (3), and the cases as to tombs in which it was followed, namely, *Hunter* v. *Bullock* (4), *Dawson* v. *Small* (5), and *In re Williams* (6). *In re Rogerson, Bird* v. *Lee* (7), was also the case of a tomb, as was *In re Vaughan* (8).

In re Connolly (9) was a case of a general charitable purpose; so also were *Attorney-General* v. *Ironmongers' Co.* (10), *Martin* v. *Margham* (11), *Chamberlain* v. *Brockett* (12), in which the intention of the testator was carried out cy près.

Cusack, for the Attorney-General, supported the argument for the parish priest, and referred to *In re Williams* (6).

Marnan, for the defendants James Thomas Barrett and Julia Barrett.

O'CONNOR M.R. reserved judgment.

Nov. 23.

O'CONNOR M.R. stated the facts as above set out, and proceeded as follows:—

There were in existence at the time of the testator's death and there are now a suitable parish church and parochial house within a quarter of a mile from Togherstown, and there is no need for another parish church or parochial house. Not only is there no need for them, but it is obvious that the building of a parish

(1) 6 Ves. 404.
(2) 3 Macq. 134.
(3) 4 Eq. 521.
(4) 14 Eq. 45.
(5) 18 Eq. 114.
(6) 5 Ch. D. 735.
(7) [1901] 1 Ch. 715.
(8) 33 Ch. D. 187.
(9) 110 L. T. 688.
(10) 2 My. & K. 576, 586.
(11) 14 Sim. 230.
(12) 8 Ch. 206.

church and parochial house in a sparsely populated country district, within a quarter of a mile of an existing parish church and parochial house, would be a futile proceeding; and it is not surprising to hear that the bishop of the diocese would not allow it. This purpose of the testator has, therefore, failed, and it is contended on behalf of the heir-at-law that the entire subject-matter of the devise, that is, the lands of Togherstown, devolved on the testator's heir-at-law, or at least that the twelve-acre field devolved upon him. On the other hand, it is contended on behalf of the parish priest that there should be a cy près application of the charitable trust for the church and parochial house, and it is suggested that part of the money might be applied towards improving the existing parochial house. The Attorney-General contends that the whole fund should now be devoted to the final trust, viz., one-half to the parish priest for the celebration of masses, and one-half for the poor of the parish.

Apart from authority I would have no difficulty in deciding that when a fund is dedicated in the first place towards a definite charitable purpose, and the residue of the fund, which is not required for that purpose, is dedicated to another charitable purpose, the whole fund is available for the latter in the event of the primary purpose failing. The intentions of testators should be carried out as far as possible, and it would seem to be an act of violence against the testator to say that because one of his purposes failed, both should fail. But it is not contended that in every such case the final purpose should fail, but only in those cases in which the amount required for the first purpose is not defined or ascertainable, because then the amount required for the final purpose is also unascertainable. This seems to me to be one of these refinements in reasoning which is more calculated to defeat than to carry out the intentions of ordinary testators. I think that when a man says that he wishes to devote a fund in the first place to a particular charitable purpose, and that when that purpose is satisfied the residue of the fund is to be devoted to another charitable purpose, he means that whatever is not required for the first, for any reason whatever, including complete failure, should go to the second. This is my own view, and it seems more conformable to common sense than completely to disappoint a

M. R. 1916.

KELLY v. ATTORNEY-GENERAL.

testator's intention. I am, however, referred to *Chapman* v. *Brown* (1), an authority which it is said binds me to decide in another way. There the testatrix gave the residue of her estate to build or purchase a chapel, the overplus to be applied up to £20 per annum for supporting a minister, and if any further overplus remained she devoted it to such charitable purposes as her executors should think fit. The gift for the chapel failed, and Sir William Grant decided that as it was impossible to determine what would have been required to build the chapel the amount applicable to the general charitable purposes could not be ascertained, and for that reason the entire gift of the residue failed. Now as I understand the argument of counsel for the heir-at-law in the present case it is that, the trust for the church and parochial house having failed, there is no means of ascertaining the date from which the rents and profits of Togherstown should be applied for the final charitable purpose, and, therefore, the gift is uncertain. But if the meaning of the gift is that the entire should be devoted to the final purpose subject to whatever may be required for the firstly named purpose, the decision in *Chapman* v. *Brown* (1) is not applicable. This is my interpretation of the gift. The whole estate is given to the trustees for the several charitable purposes specified, without any indication how much is to be spent on one purpose, and how much on another, and the testator says: "When the chapel and house (the first charitable object) are built, to hold the rest &c." I think that the fair construction of this is—subject to that trust the whole is to be given to the other charitable purpose. That gets over the difficulty, if any, which is supposed to be caused by uncertainty as to the date from which the rents were to be applied.

But the case of *Chapman* v. *Brown* (1) is by no means a well-established authority. It has not met with approval in later decisions. In *In re Williams* (2), Malins V.-C. says: "Therefore, eminent as Sir William Grant was, I feel myself bound to come to the conclusion that the decision is one that cannot be followed." That was a very clear condemnation of *Chapman* v. *Brown* (1). In a later case, *In Re Birkett* (3), Sir George Jessel, although he

(1) 6 Ves. 404. (2) 5 Ch. Div. 735. (3) 9 Ch. Div. 576.

himself expressed concurrence with the principle of *Chapman* v. *Brown* (1), felt himself bound to consider it overruled. After referring to *Fisk* v. *Attorney-General* (2), in which Wood V.-C. gave a decision which, in Sir George Jessel's opinion, was inconsistent with *Chapman* v. *Brown* (1), Sir George Jessel said: "It may be difficult on principle to discover how he" (Wood V.-C.) "arrived at that conclusion, but he did arrive at it. The gift here in question is, to my mind, wholly undistinguishable from the gift there. I cannot find any possibility of fairly distinguishing it. That decision of the Vice-Chancellor was followed twice by Vice-Chancellor Bacon, once in the case of *Hunter* v. *Bullock* (3), in which he considered it settled law; and, again, in the case of *Dawson* v. *Small* (4). It was also followed by Vice-Chancellor Malins in the case of *In re Williams* (5) so recently as the 2nd June, 1877. Consequently we have four decisions, the oldest ten years old, all in point, by three judges of co-ordinate jurisdiction. With these authorities before me, and sitting here as a judge of first instance, I shall simply follow them, and decide the case in the same way." I think myself that *Fisk* v. *Attorney-General* (2), *Hunter* v. *Bullock* (3), and *Dawson* v. *Small* (4), were distinguishable from *Chapman* v. *Brown* (1), but still we have it that Sir George Jessel thought that *Chapman* v. *Brown* (1) was no longer law.

I am, therefore, of opinion that the failure of the trust for the building of the church and parochial house accelerated the trust for the parish priest and the poor of the parish, and that if the lands had not been sold, the rents and profits would not have been applicable to it.

I do not think that the trust declared concerning the twelve-acre field failed. That field was expressly bequeathed upon trust for the accommodation of the parish priest of the parish of Coynra. It is not dependent upon the trust which failed. No doubt the field would be a greater accommodation for the parish priest if the parochial house was built on it or beside it; but it might have been an accommodation even though a quarter of a mile away from the priest's residence. It has been ascertained that £251,

(1) 6 Ves. 404.
(2) 4 Eq. 521.
(3) 14 Eq. 45.
(4) 18 Eq. 114.
(5) 5 Ch. Div. 735.

M. R. 1916. KELLY v. ATTORNEY-GENERAL.

portion of the sum of £1,443 in the hands of the Commissioners, represents the value of the field, and as the parish priest for the time being would have got the profits of the field, so now I think that he is entitled to the income of this sum when invested.

I shall declare that the costs of all parties are, in the first place, payable out of the fund when taxed. I shall direct the residue to be invested in such trust securities as the Commissioners shall approve of, and declare that the income of so much of the investments as shall represent £251 shall be paid to the parish priest of the parish of Coynra for the time being, and that one-half of the income of the residue shall be paid to the said parish priest for the time being, for offering up weekly masses for the repose of the testator's soul, and the soul of his wife, Julia Thomasina, and the other half to be divided and expended amongst the poor of the said parish every Christmas by the Commissioners with the assistance of the parish priest.

The Court made the following order:—

This Court doth declare that on the true construction of the will of the said testator William Thomas Dillon, and in the events which have happened, the bequest of the profit rent of the lands and house of Togherstown in the testator's will mentioned as to one-half thereof to the parish priest for the time being of the parish of Coynra and his successors for offering up weekly masses for the repose of the testator's soul, and the soul of his wife Julia Thomasina Dillon, and as to the other half thereof to be divided and expended amongst the poor of the said parish every Christmas by the trustees of the testator's will and the said parish priest for ever, is a good and valid charitable bequest notwithstanding the failure of the prior trusts by the said will created, and the Court doth order that the funds now representing the proceeds of the sale of the said lands after payment thereout of the costs hereinafter mentioned be invested as the Commissioners of Charitable Donations and Bequests shall direct, and that the income of so much of the investments representing the said funds as represents the sum of £251 being the proceeds of the sale of the chapel field in the said will mentioned be paid to the parish priest for the time being of the said parish of Coynra for his accommodation as in the said will provided, and that one-half of the income of the investments representing the remainder of the said funds be paid to the parish priest for the time being of the said parish of Coynra for offering up the weekly masses aforesaid, and the other half thereof be distributed amongst the poor of the said parish every Christmas by the said Commissioners with the assistance of the said parish priest of Coynra. And the Court doth declare all the parties entitled to their costs of this matter

and cause to be paid when taxed and ascertained out of the funds representing the proceeds of sale of the said lands of Togherstown, the costs of the plaintiffs to be taxed as trustees' costs.

Solicitors for the plaintiffs: *Maxwell, Weldon, & Co.*

Solicitor for the Attorney-General: *James Robinson.*

Solicitors for the defendant Thomas Donnellan: *Maxwell, Weldon, & Co.*

Solicitors for the defendant J. P. Dillon: *O'Reilly & Sons.*

Solicitors for the defendants James Francis Barrett and Julia Barrett: *Nooney & Dowdall.*

W. L.

M. R.
1917.

Jan. 25.
Feb. 5, 28.

HAYES *v.* HAYES.
(1916. No. 961.)

Will, Construction—Portions for Daughters—Gift over on death unmarried—Accrued Shares.

A testator by his will charged his estates with the sum of £27,000, and bequeathed the same to trustees upon trust to pay to each of his nine daughters the sum of £3000, not to be raised or become payable till her marriage, when same was to be paid and advanced as her fortune, but in lieu thereof each of his daughters was to receive an annuity of £100 until marriage; if any daughter died unmarried before her portion became payable, she was to have power to dispose by will of £1000 of it amongst her sisters, the residue of the portion or portions of any daughter dying unmarried to go to, and to be applied towards, increasing the portions or shares of the surviving daughters, provided that the portion or share of any daughter was in no event to exceed the sum of £5000.

The testator's nine daughters survived him. Three married, and received their portions. The testator's daughter E. died unmarried, having appointed the sum of £1000, part of the £3000, amongst such of her sisters as should survive her and not have been married, in equal shares. She left surviving six sisters, one married and five unmarried. On her death each of the fortunes of her surviving sisters became increased by the sum of £333 6*s.* 8*d.*, being one-sixth of £2000, the residue of her fortune, and her married sister became entitled to and was paid a like sum of £333 6*s.* 8*d.*

Subsequently the testator's daughter F. died unmarried, having appointed the sum of £1000, part of her £3000, to her surviving sisters in like manner. On the death of F. the fortunes of each of her four unmarried sisters, which had been increased by £333 6*s.* 8*d.*, became further increased by a sum of £400, being one-fifth of £2000 the residue of her fortune, and her married sister became entitled to be paid a like sum of £400.

Held, on the true construction of the testator's will, that the additional portions should go in the same manner as the original portions, and that the shares accrued as well as original were only raisable in the event of marriage.

Adjourned Summons brought by the trustees for the purposes of the Settled Land Acts of the will of Sir Edmund Hayes, to determine certain questions which arose on the construction of the will. The only question which called for a report was whether the case was an exception to the rule that conditions attaching to the original shares of legatees do not apply to accrued shares.

The following statement of the facts is taken from the judgment of O'Connor M.R.:—

By his will, dated 20th April, 1860, Sir Edmund Hayes, of Drumbo Castle, in the county of Donegal, Bart., devised his estates in the county of Donegal and elsewhere in Ireland, to the use of his eldest son, Samuel Hercules Hayes, for life, with remainder to his first and other sons in tail, with remainder to his second son, Edmund Francis Hayes, for life, with remainder to his first and other sons in tail, with like remainders to after-born sons and their sons in tail, with remainder to the use of his daughters as joint tenants; and he empowered his son, Samuel Hayes, and every other son of his, when in the possession or actual receipt of the rents and profits of the said estates, to charge the same with any sum not exceeding £1000 per annum, for any wife for her jointure, and by his will he charged his said estates with the sum of £31,000 for all and every his younger children; and he bequeathed the said sum of £31,000 to certain trustees therein named upon trust to pay £4000, part thereof, to his second son, Edmund Francis Hayes, on his attaining the age of twenty-one years, and as to the residue thereof, viz., the sum of £27,000, upon trust to pay each of his nine daughters therein named a sum of £3000, with a proviso that the said sum of £3000 should not be raised or become payable until the marriage of such daughters, when same should be paid and advanced as her fortune; but in lieu and stead thereof each of his daughters should receive and be paid out of the said estates an annuity of £100 until her marriage, with a further proviso that if any of his said daughters should happen to die unmarried and before her portion of the sum of £27,000 should become payable, then the daughter so dying should have power to dispose by her will of £1000 of the said sum of £3000, bequeathed to her as aforesaid, to and amongst any of her sisters as she should think proper, the residue of the portion or portions of any of his said daughters so happening to die unmarried to go to and be applied towards increasing the portions or shares of the surviving daughters, with a proviso that in no event should the portion or share of any of his said daughters exceed the sum of £5000; and the testator further willed that his second son, Edmund Francis Hayes, should have an annuity of £150

M. R. 1917.

HAYES v. HAYES.

during his minority or until the sum of £4000 should be fully paid off.

The testator died on the 22nd June, 1860, and his will was proved on the 20th July, 1860. He left surviving his two sons and nine daughters mentioned in the will. The eldest son, who became Sir Samuel Hayes, married in the year 1878 the Honourable Alice Anne Hewitt, and by an indenture dated 25th July, 1878, in exercise of the power vested in him by the will of his father he charged the estate with a jointure rent-charge of £1000 in her favour in the event of her surviving him.

He died on the 6th November, 1901, without male issue, leaving his widow, Alice Anne Hayes, him surviving. She thereupon became entitled to the jointure of £1000 per annum.

On the death of Sir Samuel Hayes his brother, Edmund Francis Hayes, who had attained the age of twenty-one, succeeded to the baronetcy and to the estates. He married, and by his will, dated 2nd September, 1910, in exercise of the power contained in his father's will, charged the estates with a jointure rent-charge of £1000 in favour of his wife, Alice Isabella Hayes, in the event of her surviving him. He died on the 27th January, 1912, without having revoked his will, which was proved on the 31st July, 1912.

His widow, Alice Isabella Hayes, thereupon became entitled to another jointure of £1000 per annum charged on the estates.

Of the nine daughters three married. One of them, Mary Frances, married James Patterson in 1872, and died many years ago. Another, Emma Agnes, married William Woods in 1879. She is still living. Another, Maria, married the Honorable Cornwallis Charles Hewitt in 1881, and she died in August, 1882. These three daughters became on their respective marriages entitled to be paid their portions of £3000 each, and these sums became raisable out of the lands.

The sum of £4000, the portion of the second son, also became raisable on his attaining the age of twenty-one.

The remaining daughters were—1, Elizabeth, 2, Catherine, 3, Georgina, 4, Emily, 5, Alice Caroline, and 6, Louisa. None of them married.

Elizabeth Hayes died on the 26th March, 1899, having made a will, dated the 28th May, 1886, whereby, in exercise of the

power vested in her by her father's will, she appointed the sum of £1000, part of her portion of £3000, among such of her sisters as should survive her and had not married. Her will was proved on the 26th August, 1899. She left surviving five unmarried sisters, viz.:—Catherine, Georgina, Emily, Alice Caroline, and Louisa, each of whom became entitled to one-fifth share of £1,000, part of the deceased's portion of £3,000.

Emily Anne Hayes died unmarried on the 11th December, 1915, having made her will, dated 20th May, 1904, whereby she appointed £1000, part of her portion of £3000, among such of her sisters as should survive her and had not married. She left four surviving unmarried sisters.

The plaintiffs in the summons were Catherine Hayes (one of the unmarried daughters of the testator) and Hubert Humphrey, who had been appointed trustees of the will of the testator for the purposes of the Settled Land Acts. The defendants were Alice Ann Hayes and Alice Isabella Hayes, who were each entitled to a jointure of £1000, charged on the estates, appointed by the testator's sons Sir Samuel Hercules Hayes and Sir Edmund Francis Hayes in exercise of the power contained in the testator's will as already mentioned, Emma Agnes Woods (daughter of the testator) and her husband Colonel William Woods, Georgina Mary Anne Hayes, Alice Caroline Hayes, and Louisa Lydia Hayes, unmarried daughters of the testator.

The question in the summons for the determination of the Court on which the point arose was as follows:—

How did the original share (£3000) of the said Emily Anne Hayes deceased, and the portion of the share of the said Elizabeth Hayes deceased that accrued thereto on her death become distributable on the death of the said Emily Anne Hayes, deceased? And are the defendants Emma Agnes Woods, Georgina Mary Anne Hayes, Alice Caroline Hayes, Louisa Lydia Hayes, and the plaintiff Catherine Hayes, entitled to have any, and, if so, what sum raised and paid to them respectively in respect thereof.

Walker K.C., for the plaintiffs.

M. R. 1917.

HAYES v. HAYES.

J. E. Walsh, for the defendants Alice Anne Hayes and Alice Isabella Hayes the jointresses :—

On the death of Elizabeth Hayes the unmarried daughters became entitled, contingently on marriage, to one-sixth of £2000, or £333 6*s.* 8*d.*, each under the accruer clause, their original shares becoming increased accordingly, and Mrs. Woods became immediately entitled to £333 6*s.* 8*d.* On the death of Emily Anne Hayes the unmarried daughters became entitled, contingently on marriage, to one-fifth of £2000 or £400 each under the accruer clause, their original shares becoming increased accordingly, and Mrs. Woods became immediately entitled to £400.

But, as to the accrued share of £333 6*s.* 8*d.* of Emily Anne Hayes, it lapsed on her death for benefit of the estate,—the contingency of marriage upon which she would have become entitled not having happened. In any event, the accruer clause would not operate on this accrued share, under the general rule that a clause of accruer of shares of legatees does not prima facie operate on shares which have already accrued under the clause in question: "Hawkins on Wills" (ed. 1912), p. 320; *Ex parte West* (1), *Pain* v. *Benson* (2). The rule applies where "portion" is used: *Bright* v. *Rowe* (3).

The rule is excluded if an intention is expressed of keeping the fund in an aggregate mass, with a gift over of the whole to persons in remainder: *Douglas* v. *Andrews* (4). Here no such intention is expressed, but, on the contrary, the provision that no daughter's portion was to exceed £5000 is evidence of intention that the whole fund should not ultimately go to the survivor of the class.

Babington, for the defendants Georgina Mary Anne Hayes, Alice Constance Hayes, and Louisa Lydia Hayes, the unmarried daughters of the testator :—

The rule established by the cases is that accrued legacies are not subject to the same conditions as original legacies. The

(1) 1 Bro. C. C. 575; 1 P. Wms. 275.
(2) 3 Atk. 80.
(3) 3 My. & K. 316.
(4) 14 B. 355.

unmarried daughters are, therefore, entitled absolutely to the shares of the portions which accrued to them on the deaths of their sisters Elizabeth Hayes and Emily Anne Hayes, and to have these shares raised and paid. The testator charged his estates with £27,000 for his daughters, and the limitation of £5000 is the only indication in ease of the estate.

Herbert Wilson K.C. and *E. S. Murphy*, for the defendants, Emma Agnes Woods and William Woods:—

The rule is that accrued legacies are not subject to the same conditions as original legacies, but this case is an exception to that rule, as the testator intended that the same conditions should apply to the increase of the portion of an unmarried daughter by reason of the gift over on her death as applied to the original portion, which was only raisable and payable in the event of marriage. The intention of the testator was to relieve the estate of the portion, except in the case of a married daughter. The power to appoint £1000 of the £3000 would be unnecessary, if the contention of the unmarried daughters is right. That power has been exercised by both the wills of Elizabeth Hayes and Emily Hayes, and the sums so appointed are raisable.

The original portion is payable only in the event of marriage, and the share of the £2000 which goes to each daughter is to increase her portion, and is subject to the same condition. Mrs. Woods has been paid her original portion, and £333 6*s.* 8*d.*, her share of her sister Elizabeth's £2000, and it is submitted that she is entitled to be paid £400, one-fifth of her sister Emily's £2000, and £66 13*s.* 4*d.*, one-fifth of the sum of £333 6*s.* 8*d.*, which accrued to her sister Emily on the death of her sister Elizabeth.

Feb. 28.

O'CONNOR M.R., having stated the facts as above set out, proceeded as follows:—

On the death of Elizabeth Hayes the sum of £1000 appointed by her will became raisable. There is no question about that. But a question does arise in connexion with the balance of the £3000. This balance went, under the will of Sir Edmund Samuel Hayes, towards increasing the portions or shares of the daughters who survived Elizabeth. Does this mean that each of

M. R. 1917.

HAYES v. HAYES.

the surviving daughters became entitled on the death of Elizabeth to be paid her share of the £2000, or that her share was to be added to the original £3000, and to be subject to the same limitations, viz., that it was to be payable only on marriage, with a gift over on death without marriage to the surviving daughters? If the former, each of the surviving unmarried daughters was entitled to be paid, not merely £200 (her one-fifth share of £1000), but £333 6*s.* 8*d.* (one-sixth share of £2000), there having been five survivors unmarried and one married. The surviving married daughter became, in any case, entitled to be paid £333 6*s.* 8*d.* If, however, the sums which accrued on the death of Elizabeth Hayes to the shares of the surviving unmarried daughters became subject to the same limitations as the original shares of £3000, then each such share became increased to the sum of £3333 6*s.* 8*d.*, payable only on marriage, and liable to go over on death without marriage.

A similar question arises by reason of the death of Emily Anne Hayes. Did only a share of £2000 pass to each of her surviving sisters, and did such share pass absolutely, or did a share of £3333 6*s.* 8*d.* pass to each of them subject to the same conditions and limitations which affected the original £3000?

It is now well established as a general proposition that clauses in a will disposing of shares of devisees and legatees dying before a given period, or the happening of an event, do not without a positive and distinct indication of intention extend to shares accruing under the clauses in question. But the application of this principle is frequently difficult, as it is in the present case. Is there in the will we are considering an indication of intention that the share going over on death unmarried shall again go over on the death unmarried of the legatee to whom the share had gone over? Now, what are the indications of intention to be found in this will? Firstly, we have the power vested in each legatee to appoint £1000 among her sisters, thus freeing so much of each portion of £3000 from the conditions of the will. This carries with it a suggestion, if not an indication, that the remaining £2000 was to remain subject to the will. This by itself is not very much to go upon, but there is this further element, which appears to me to be a very strong indication. The £1000 the

subject of the power is to go over to the legatees themselves. This is not so in the case of the £2000. That is not given to the legatees; it is to go to and be applied towards increasing the portions or shares of the surviving daughters. The accrued share is to become part of the original. It is to become consolidated with it. The share is to be increased, but that does not mean that it is to have two separate and distinct parts, one to be distinguished as the original, the other as the accrued portion. The condition then which attached to the share in its original size must attach to it when enlarged. Here I think that the law as to substituted and added legacies helps the construction. If a legacy of £1000 is given to A. by will subject to certain conditions, and if by codicil that legacy is increased to £2000, the legatee takes it subject to the conditions imposed by the will. The result is the same when the legacy given by the codicil is a substituted legacy. This would not be the case if the legacy given by the codicil to A. was a new and independent legacy. So I think that, if there is a clause of accruer, under which each accrued share is directed to go over by way of addition to the original legacies, and not by way of gift to the legatees personally, the added sum should be subject to the same conditions as the original amounts.

This construction seems to me to be supported by the clause which limits the ultimate share of any daughter, made up of the original and accrued shares, to £5000. This sum of £5000 was evidently regarded by the testator as one portion, undistinguishable in its parts, and not as an aggregate of parts, subject to separate trusts, which would require the opening up of a separate account for each part. Further, the declaration by the testator that in no event should any of his daughters get a greater portion than £5000 might be indirectly frustrated if the accrued shares went absolutely to the survivors. There were nine unmarried daughters of the testator at his death. If they all remained unmarried, there would be at least eight sums of £2000 to go over under the accruer clause; and if each accrued share went absolutely to the survivors, they would be entitled at once to raise their accrued shares out of the lands; and if each daughter made a will in favour of her surviving sisters, the last surviving sister would have got £16,000, which had come from the estates, independently

M. R. 1917.

HAYES v. HAYES.

of her original £3000. This could not have been prevented by the £5000 limitation clause, because, once the money was raised and paid, it would be free from the limitations in the will. Thus it will be seen that this clause could have no effective operation unless the accrued shares followed the original.

I am therefore of opinion that the accrued shares of each sum of £2000, which goes over on the death of each unmarried daughter, are subject to the same conditions as each portion of £3000 is subject to.

A question has also been raised whether each sum of £2000 as it went over went to all the surviving daughters or only to the unmarried daughters. I can find nothing in the will confining the gift over to the unmarried daughters, and I hold that each sum of £2000 went over among all the surviving daughters, married and unmarried. This gave the share which accrued to Mrs. Emma Agnes Woods to her absolutely, because her original share had vested absolutely.

Solicitors for the plaintiffs: *M'Mahon & Tweedy.*

Solicitors for the defendants Emma Agnes Woods and William Woods: *Wm. Findlater & Co.*

Solicitors for the defendants Alice Anne Hayes and Alice Isabella Hayes: *M'Mahon & Tweedy.*

Solicitors for the defendants Georgina Mary Anne Hayes, Alice Caroline Hayes, and Louisa Lydia Hayes: *M'Mahon & Tweedy.*

W. L.

(1905. No. 125.)

COX *v.* DUBLIN CITY DISTILLERY COMPANY, LTD.

(No. 3.)

Barton J.
1916.
June 16.
July 10.

Appeal.
1917.
Jan. 17, 18.
Feb. 27.

Company—Debentures—Validity of—Estoppel—Res Judicata—Test Action, Order XVI, R. 8.

By a deed executed in 1895, property of a distillery company was conveyed to trustees for the holders of second debentures to be thereafter issued. The articles of association of the company provided that no director should vote in respect of any matter in which he was individually interested, the quorum of directors being fixed at two.

D., a director of the company, advanced moneys to the company on the security of manufactured whiskey of the company stored in a warehouse, and also upon second debentures issued to him by the company in 1903, but forming part of the series secured by the trust deed of 1895. There was admittedly no quorum of independent directors present at the meeting which purported to authorize the issue of these debentures to D.

The present action was instituted in 1905 by the plaintiff on behalf of himself and all other holders of first debentures claiming a declaration that certain first mortgage debentures were well charged on the property of the company, and a liquidator was subsequently appointed (*Cox* v. *Dublin City Distillery*, [1906] 1 I. R. 446; [1915] 1 I. R. 345).

In 1909 D. instituted an action for a declaration as to his rights against the company in liquidation and the trustees for the second debenture-holders. The latter defendants delivered no defence, and D. obtained judgment against them by default. The company impeached D.'s right to claim a lien on the second debentures, on the ground that these were not registered under the Companies Act, 1900, but no point as to the absence of a proper quorum at the meeting which purported to authorize the issue of D.'s debentures was either pleaded or specifically relied upon in argument. D.'s action subsequently resulted in a declaration by the House of Lords that D. was not entitled to a valid pledge of the whiskey, but was entitled to a valid lien on the debentures for the amount of his advances to the extent of the property comprised in the trust deed.

On the hearing of a memorandum from the Chief Clerk in the present action:

Held, by the Court of Appeal (1), reversing the order of Barton J., that C. R. and G., as representing the holders of valid second debentures issued by

(1) Before SIR I. J. O'BRIEN L.C., and RONAN and MOLONY L.JJ.

Barton J. 1916.

Cox v. Dublin City Distillery.

the company in 1895, were sufficiently represented by the trustees for the second debenture-holders in the action brought by D. against the company and the said trustees, and that the order of the House of Lords in the latter action operated as an estoppel so as to preclude C., R., and G. from relying in the present action on the invalidity in the creation of D.'s debentures.

Memorandum from Chief Clerk submitting for the consideration of Barton J. the following question :—

Whether, having regard to the decision of this Honourable Court on the 24th February, and of the Court of Appeal in Ireland on the 28th June, 1915, that the resolutions of the directors of the company, passed on the 12th and 16th May, 1903, and 20th January, 1904, are invalid, the debentures mentioned in the schedule hereto are invalid as against the holders of valid second debentures of the company.

And whether Edward Doherty (or Frederick Hans Kennedy on his behalf) should be allowed to prove on foot of the said debentures mentioned in the schedule hereto in competition with the holders of such valid second debentures in respect of advances made to the company by Edward Doherty; or

Whether William Carroll, George Richardson, and Patrick Gaynor, on behalf of themselves and the other second debenture-holders, whom they were appointed to represent by order herein, dated the 25th July, 1915, are in anywise precluded from relying upon the invalidity of the said resolutions and the debentures issued thereunder as against them by the orders of this Honourable Court, dated the 8th June, 1911, made in an action in which the said Edward Doherty was plaintiff, Frederick Hans Kennedy, William Findlater, and the above-named company defendants, whereby it was declared : "that the plaintiff is entitled to a good and valid lien on the debentures mentioned in the 26th paragraph of the statement of claim, being the debentures mentioned in the schedule hereto, so far as the same affect the freehold and leasehold premises comprised in the trust deed dated the 9th day of November, 1905, for the amount of his advances," which said order was affirmed by the Court of Appeal in Ireland by order dated the 17th May, 1912, and by the House of Lords by order dated the 17th July, 1914.

SCHEDULE.

Name of present holder.	No. of debentures and amount.	Debenture No. both inclusive.	Amount of Principal.
Frederick Hans	3 of £100	241 to 243	£300
Kennedy as	4 of £100	262 to 265	£400
Trustee for	3 of £10	305 to 307	£30
Edward Doherty	17 of £100	214 to 230	£1700

The facts referred to before Barton J. are fully reported in *Cox* v. *Dublin City Distillery* (*No.* 2) (1), and appear in his judgment.

Serjeant Sullivan K.C., and Overend, for William Carroll, George Richardson, and Patrick Gaynor.

Herbert Wilson K.C., Garrett W. Walker K.C., and James Andrews, for Edward Doherty.

The arguments were similar to those in the Court of Appeal, reported infra, p. 208.

July 10.

BARTON J.:—

By order dated July 28th, 1915, the applicants William Carroll, George Richardson, and Patrick J. Gaynor, holders of second debentures of the Dublin City Distillery, were appointed to represent the class of second debenture-holders, other than certain specified debenture-holders one of whom is Edward Doherty. These representative parties have instituted this proceeding by way of memorandum for the purpose of having it decided whether twenty-seven debentures issued by way of security for advances to the company to Frederick Hans Kennedy as trustee for Edward Doherty are invalid as against the holders of valid second debentures of the company. Twenty-four of these debentures were for the amount of £100 and three for the amount

(1) [1915] 1 I. R. 345.

Barton J.
1916.

Cox
v.
Dublin City Distillery.

of £10, in all £2430. They are impeached upon the ground that the meetings at which the resolutions were passed authorizing their issue were not properly constituted. Their invalidity is admitted, and the only question for decision is whether the applicants are precluded from averring their invalidity by an order of the Court, dated 8th June, 1911, affirmed on this point by an order of the Court of Appeal and the House of Lords in an action in which Edward Doherty was plaintiff, the company and the trustees for the second debenture-holders were the defendants. The applicants were not parties to that action, but it is said that they were privies through their trustees, who were defendants.

That action was brought mainly to establish the plaintiff's claim as pledgee of whiskey in casks against the company in priority to the second debenture-holders. That was the only contentious question in the action, but the plaintiff also stated in paragraph 26 of the Statement of Claim that these twenty-seven debentures had been issued to Frederick Hans Kennedy as trustee for him as a security for money advanced and claimed, in paragraph 5 of the prayer of the Statement of Claim, a good and valid lien on them for the amount of such advance and interest thereon, and by the order of the Court he obtained a declaration that he was entitled to a good and valid lien upon the debentures mentioned in paragraph 26 of the Statement of Claim, and an account of the moneys available to meet such lien, and of the sum due to him on foot thereof. That order was made so far as the trustees of the second debenture-holders were concerned in default of defence.

In my opinion the applicants are not precluded by that judgment from averring the invalidity of these debentures. On their behalf reliance was placed upon the principle which was referred to the old case of *Hamond* v. *Walker* (1), that trustees are not deemed to represent the interest of absent cestuis que trust in a contention between cestuis que trust inter se, although it may be otherwise in a contention between a stranger and all the cestuis que trust. It was suggested in reply that this was an obsolete doctrine which is superseded by Rule 8 of Order 16 of the rules of the Supreme Court. That rule enables trustees, executors, and administrators

(1) 3 Jur. N. S. 686.

to sue and be sued as representing the estate of which they are trustees without joining beneficiaries, and provides that they shall be considered as representing such beneficiaries, but goes on to provide that the Court or judge may, at any stage of the proceedings, order beneficiaries to be added or substituted as parties. That useful rule does not in my opinion affect the principle to which I have referred. It recognizes that in certain proceedings trustees and personal representatives would not adequately or properly represent beneficiaries.

The principle referred to in *Hamond* v. *Walker* (1) was discussed in *De Mora* v. *Concha* (2), reported in the Court of Appeal and in the House of Lords under the name of *Concha* v. *Concha* (3). Although the ground of that decision does not affect the present case, the principle to which I have just referred was incidentally alluded to both in the arguments and in the judgments in the Court of Appeal. In the arguments it was recognized that the executor does not represent beneficiaries in internal disputes; and Fry L.J., in the course of observations made on behalf of Baggally L.J. and himself, remarked, at p. 305, that " where the litigants both claim under a third person, it seems that such third person can never be a legitimus contradictor on behalf of one of them against the other of them."

In *Doherty* v. *Kennedy* (4), and others, which is relied upon as working an estoppel in the present case, Mr. Doherty did not claim adversely to the trust estate in respect of these debentures, but as a cestui que trust he claimed the benefit of the trust deed. That being so, the trustees for the second debenture-holders cannot be regarded as having constituted a legitimus contradictor on behalf of the applicants so as to preclude them from challenging the validity of these debentures.

I must add that there is another serious difficulty in the way of this plea of estoppel. What Mr. Doherty, in the action of *Doherty* v. *Kennedy* (4), sought to obtain, and succeeded in obtaining, was not a declaration as to the validity of the debentures, but as to the validity of his lien on them for his advances, and an inquiry as to the amount of those advances, and the sums available

(1) 3 Jur. N. S. 686.
(2) 29 Ch. D. 268.
(3) 11 A. C. 541.
(4) [1914] A. C. 823.

Barton J. 1916. Cox v Dublin City Distillery.

for discharging them. That declaration is not inconsistent with the present application. The validity of the debentures was never in dispute. It was not raised, argued, or decided in that suit. Indeed the trustees do not appear to have been under any obligation to raise it. Their duty under the terms of clause 6 of the trust deed was to apply any moneys arising from the sale under the trust for conversion contained in the deed towards payment pari passu without preference or priority of arrears of interest and principal to the holders of second debentures according to the tenor of their debentures.

Other objections were raised to this alleged estoppel which I need not discuss. There will be a declaration that the debentures mentioned in the schedule to the memorandum are invalid as against the holders of valid second debentures of the company, and that the applicants William Carroll, George Richardson, and Patrick Gaynor, are not precluded from so averring by the order of the Court, dated the 8th June, 1911, made in the action in which Edward Doherty was plaintiff, and Frederick Hans Kennedy, William Findlater, and the above-named company were defendants.

D. M. S.

Mr. Edward Doherty appealed to the Court of Appeal.

1917. Jan. 17, 18. Feb. 27.

H. Wilson K.C. and *G. W. Walker K.C.* (*J. Andrews* with them), for the appellants:—

We contend that the respondents are bound by the decree of the House of Lords in *Dublin City Distillery, Ltd.*, v. *Doherty* (1), under which Doherty was declared entitled to a good and valid lien on the debentures in question so far as the same affected the freehold and leasehold premises comprised in the trust deed. Barton J. has placed too narrow a construction on this decree, namely, that Doherty was entitled to a lien on the debentures, in so far as there were valid debentures in existence. This would render the decree of the House of Lords entirely nugatory. It

(1) [1914] A. C. 823.

was never intended to decide that Doherty had a good charge upon invalid debentures. The judgment of Lord Parker is specific to the effect that Doherty was a cestui que trust under the trust deed, and was entitled to the benefit of the trust deed with the other holders of second debentures. The debentures were voidable only, and not void, until assailed. The company got the cash from Doherty, and could have ratified the invalidity in the creation of the debentures. Neither the company nor the trustees for the holders of second debentures raised this particular question of invalidity in Doherty's action, although the validity of the debentures was specifically raised on the pleadings, and was in issue in the action. It cannot be said that Doherty's action was wrongly constituted as to parties. Under Order 16, Rule 8, the trustees for the second debenture-holders represented the latter, who are as much bound by the decision as if they had been made individual defendants. In *Cox* v. *Dublin City Distillery* (*No.* 2) (1), Palles C.B., speaking of this action, said: "The second debenture-holders as a class were represented in that action by their trustees, and therefore the second debenture-holders are estopped from raising, *as against the plaintiff in that suit*, not only any defences which they did raise in that suit, but also any defence which they might have raised, but did not raise therein." This disposes of the present contention. See also *Howlett* v. *Tarte* (2), and *Humphries* v. *Humphries* (3).

[Ronan L.J. referred to *In re Lart*; *Wilkinson* v. *Blades* (4).]

Assuming that, as laid down in *Hamond* v. *Walker* (5), trustees will not be deemed to represent the interests of absent cestuis que trust on any contention amongst the latter inter se, the contest in Doherty's action was not one amongst the cestuis que trust; in addition to his claim to a pledge of the whisky he sought to establish his claim as a cestui que trust under the trust deed.

In *Concha* v. *Concha* (6) the finding of the Probate Court on the question of domicil was, as pointed out in the judgments, irrelevant, and could not operate as an estoppel. *The Irish Land*

(1) [1915] 1 I. R. 345, at p. 372.
(2) 10 C. B. N. S. 813, at p. 826.
(3) [1910] 1 K. B. 796; [1910] 2 K. B. 531.
(4) [1896] 2 Ch. 788.
(5) 3 Jur. N. S. 686.
(6) 11 A. C. 541.

Appeal. 1917. Cox v. Dublin City Distillery.

Commission v. *Ryan* (1) is clearly distinguishable. There the original judgment was obtained in default of appearance, and there was no record which could operate as an estoppel. Here we rely on the words of the decree in the House of Lords.

[They also relied on the affidavit of Mr. R. Dickie, cited infra in the judgment of the Lord Chancellor, to show that the appeal to the House of Lords in Doherty's action was in fact brought on behalf of the holders of valid second debentures.]

The following cases were also referred to:—*Francis* v. *Harrison* (2); *Commissioners of Sewers of the City of London* v. *Gellatly* (3) *In re New London and Suburban Omnibus Co., Appleyard* v. *the same Co.* (4); *In re Cooper* (5); *Wilkins* v. *Reeves* (6); *In re Bowden, Andrew* v. *Cooper* (7).

Serjeant Sullivan K.C., and *Overend*, for the respondents:—

The resolutions for the issue of the second debentures in question are void. There was no quorum: *Re Greymouth*; *Point Elizabeth Railway and Coal Co., Ltd.* (8); and the decision in *Cox* v. *Dublin City Distillery* (9) in this effect is a binding authority that the resolutions are invalid.

The only question is whether respondents are prevented from raising the point by the decision in *Doherty* v. *Kennedy* (10). The respondents are second debenture-holders of the original issue to the amount of £13,570 in 1895. They were not parties to *Doherty* v. *Kennedy* (10). The trustees for second debenture-holders who were parties represented the whole 25,000 second debentures, and could not represent one portion of their cestuis que trust in a dispute inter se. *Hamond* v. *Walker* (11), supra; see also judgment of Molony L.J. in *Cox* v. *Dublin City Distillery* (9). If the trustees for second debenture-holders did represent the respondents, the latter are nevertheless not estopped from now alleging the invalidity of the debentures in question.

(1) [1900] 2 I. R. 565.
(2) 43 Ch. D. 183.
(3) 3 Ch. D. 610.
(4) [1908] 1 Ch. 621.
(5) 20 Ch. D. 611.
(6) 3 W. R. 305.
(7) 45 Ch. D. 444.
(8) [1904] 1 Ch. 32.
(9) [1915] 1 I. R. 345.
(10) [1914] A. C. 823.
(11) 3 Jur. N. S. 686.

That action was in effect one to establish Doherty's right to a pledge on the whisky, and no importance was attached to the question of the validity of the debentures, save so far as regards the question of non-registration.

Estoppel by record is confined to matters appearing on the record, and the record only declares Mr. Doherty entitled to a valid lien on the debentures, and does not decide on the validity of those debentures on the ground in question.

Further, the trustees could not raise the point against their own cestui que trust. Once a debenture, regular on its face, was issued, the trustees became trustees for the holder (see judgment of Lord Parker in *Doherty* v. *Kennedy* (1)). If the trustees could have raised this point, it was one raisable only by special defence, and not by a mere traverse, and the trustees delivered no defence, and judgment went by default: *Howlett* v. *Tarte* (2), supra; *Humphries* v. *Humphries* (3), supra; *Irish Land Commission* v. *Ryan* (4), supra.

The appellants are not entitled to use the affidavit of R. Dickie, filed on the petition of competency; it is not in evidence; the respondents have had no opportunity of giving evidence to show, as the fact is, that the persons whom they represent were no parties to any such arrangement as is there suggested. But if the affidavit were in evidence, it only states that "certain" second debenture-holders agreed to indemnify the liquidator, and this could not bind the class.

The following cases were also referred to:—*De Mora* v. *Concha* (5); *Concha* v. *Concha* (6), supra; *Worman* v. *Worman* (7).

H. Wilson K.C., in reply.

(1) [1914] A. C. 823.
(2) 10 C. B. N. S. 813, at p. 826.
(3) [1910] 1 K. B. 796; [1910] 2 K. B. 531.
(4) [1900] 2 I. R. 565.
(5) 29 Ch. D. 268.
(6) 11 A. C. 541.
(7) 43 Ch. D. 296.

Appeal.
1917.
Cox
v.
Dublin City Distillery.

Sir Ignatius J. O'Brien C.:—

In this case it is our duty carefully to consider the judgment of Mr. Justice Barton, by which he has held that the previous proceedings, in which Mr. Doherty was plaintiff, and the company and the trustees for the second debenture-holders were defendants—proceedings which ultimately came before the House of Lords, and were decided to a certain extent in Mr. Doherty's favour—were of no effect whatsoever as between Mr. Doherty and certain other of the second debenture-holders in this company, whose interest it was to have it determined that Mr. Doherty's claim in respect of certain debentures was wholly bad. It is not that the result arrived at by Mr. Justice Barton would enhance the value of the general assets of the company available for unsecured creditors, but the exclusion of one debenture-holder would, in the circumstances here existing, enhance the value of what was left available for the remaining debenture-holders.

It is absolutely essential, in order to arrive at a definite view of the facts and of the law, to consider carefully the nature of the different stages of this action of *Doherty* v. *Kennedy* (1). Mr. Doherty had a double claim against the assets of the company. In the first place, he claimed to have a prior right against these assets in respect of certain pledges made to him of whisky, part of the stock-in-trade of the company; and, secondly, he claimed that, even if he had not got an effective lien on this whisky, in so far as there was property comprised in a certain deed of trust, of which Mr. Hans Kennedy was trustee, he had, through certain debentures, which he owned or controlled, a limited claim against the assets of the company pari passu with other holders of second debentures.

The action was brought for the purpose of determining whether or not, 1, there was a lien created on the whisky, and, 2, whether Mr. Doherty had a valid charge on the assets of the company comprised in this deed of trust. It was decided ultimately by the House of Lords that, owing to certain defects, which I need not specifically refer to, the issue of the warrants,

(1) [1912] 1 I. R. 346, 363.

which were supposed to create a lien on the whisky, was ineffective; but the House of Lords, on the other hand, decided to a limited extent in Mr. Doherty's favour, holding that he was entitled to a good and valid lien on the property comprised in the trust deed. [His Lordship referred to the order of the House of Lords of the 17th July 1914 (1), and continued.]

The result was that the other debenture-holders were placed in a better position with regard to the assets of the company than they would have been in if Mr. Doherty had succeeded in his claim based upon a pledge; but, of course, in so far as his claim was declared to be a valid one in respect of the premises in the deed of trust, it placed him in an advantageous position in respect of his claim, not, of course, to the same extent as if he had succeeded in sustaining his claim as pledgee. But the decree of the House of Lords gave him a substantial advantage, which it is now sought to take away from him.

The first matter which has to be determined before coming to the question of estoppel is, what is the meaning of the former order in connexion with the same subject-matter, which Barton J. made, and whether or not the present declaration which has been made by Barton J. is, as he considers, consistent with his own decree and that of the House of Lords. The order made originally by Barton J. in *Doherty* v. *Kennedy* (2) on the 8th June, 1911, directed, amongst other things, an account of the proceeds of the sale of the whiskies, which, as the learned judge held, were pledged to Mr. Doherty, and "an account of what charges for first debenture-holders, costs, charges, and expenses of realization and receiver are payable out of said proceeds in priority to said pledge . . .," and the plaintiff was declared "entitled to a good and valid lien on the debentures mentioned in the twenty-sixth paragraph of plaintiff's statement of claim so far as the same affect the freehold and leasehold premises comprised in the trust deed dated the 9th day of November, 1895, for the amount of his advances." That was the order made by Barton J. and affirmed by the House of Lords in so far as the latter part dealing with the trust deed is concerned, and it can bear no meaning other than this—that Mr. Doherty had a good charge

(1) [1914] A. C. 823, at p. 868. (2) [1912] 1 I. R. 346, 363.

Appeal. 1917.

Cox v. Dublin City Distillery.

Sir Ignatius J. O'Brien C.

on certain assets of the company. Lord Parker, in giving judgment in the House of Lords (1), places the matter beyond all doubt.

"By this deed," he said, "certain freeholds and leaseholds belonging to the company were conveyed or demised to the trustees therein named, upon trust in certain events therein specified to sell the same and hold the proceeds subject to the payment of costs in trust for the holders of such second debentures as the company might thereafter issue. Clearly neither the trust deed itself nor any second debentures issued prior to the passing of the Companies Act, 1900, required registration under that Act. But the company, after the passing of that Act, issued certain second debentures to the respondent, these debentures containing 1, a clause entitling him to the benefit of the trust deed, and 2, a floating charge over all the assets of the company. So far as this floating charge is concerned, it is admitted to be void as against the liquidator of the company for want of registration under the 14th section of the Act, but the question arises whether, notwithstanding such want of registration, the respondent is not entitled to the benefit of the trust deed pari passu with the other holders of second debentures. I have come to the conclusion that he is so entitled. As a holder of second debentures he is a cestui que trust under the trust deed, which itself is good as against the liquidator, though unregistered. His debentures are not entirely avoided by the 14th section, even against the liquidator, but avoided only so far as any security on the company's property or undertaking is thereby conferred. In my opinion the security to which the respondent claims title is, so far as the property comprised in the trust deed is concerned, conferred by such deed and not by the debentures. Even if the debentures had not referred to the trust deed, the respondent would have been a cestui que trust thereunder. . . . In my opinion, on this point the appeal fails."

I am quite unable to accept the view of Mr. Justice Barton as to the consistency of his present order with his own former order and the decision of the House of Lords. He says in the judgment now under review, "I must add that there is another

(1) *Dublin City Distillery, Ltd.*, v. *Doherty*, [1914] A. C. 823, at p. 859.

serious difficulty in the way of this plea of estoppel. What Mr. Doherty, in the action of *Doherty* v. *Kennedy* (1), sought to obtain, and succeeded in obtaining, was not a declaration as to the validity of the debentures, but as to the validity of his lien on them for his advances, and an inquiry as to the amount of those advances and the sums available for discharging them. That declaration is not inconsistent with the present application. The validity of the debentures was never in dispute. It was not raised, argued, or decided in that suit. Indeed, the trustees do not appear to have been under any obligation to raise it."

I am absolutely unable to agree in the view that the declaration now made, namely, that the debentures in question are invalid as against the holders of valid second debentures of the company, is consistent with the former decision of the House of Lords. That, however, does not dispose of the case. There is no doubt that the entire claim of Mr. Doherty might have been effectively assailed in the former proceeding before the House of Lords by reason of a defect in the resolution forming the first step towards the creation of a valid charge, there not having been a majority of technically independent directors present when the right was sought to be conferred on Mr. Doherty. So far as the company is concerned it is admitted that the order made by the House of Lords is a complete estoppel as to this matter, and it is necessary to see whether or not it is equally binding on the other debenture-holders. It has been suggested in the argument before us that a document to which I shall refer ought not to be referred to for the purpose of ascertaining what the real position of the trustees of this trust deed was, but I cannot agree in this. The original action was brought in this way. It was evident that the position of Mr. Doherty, claiming as he did to be a pledgee of the whiskies, was one hostile to the other persons who held second debentures, and, it being a hostile claim, it was necessary that Mr. Doherty should pursue it in a hostile manner, bringing before the Court all parties interested in resisting his claim, which was intrinsically of a twofold character. He applied to the Court for leave to take proceedings. He was joined originally with a Mr. Kennedy (not the gentleman who was

(1) [1912] 1 I. R. 346, 363.

Appeal. 1917. Cox v. Dublin City Distillery. Sir Ignatius J. O'Brien C.

a trustee under the trust deed); but, after a short time, this Mr. Kennedy, whose position would have been the same as that of Mr. Doherty, elected to withdraw from the proceedings, and Mr. Doherty alone carried on the further proceedings, which were constituted in this way. In the first place, the company were made defendants. The company were, owing to the illegality which had taken place, bound to resist the claim of Mr. Doherty in every way permitted to them by the law, either by seeking to destroy the pledge, or by denying the validity of the claim based upon the trust deed; and, accordingly, we find that not only the company but also the trustees of the trust deed were made defendants. There was no other practicable way in which Mr. Doherty could have constituted his suit so as to have represented before the Court all parties interested in its subject-matter so that they might be bound, and it is not suggested that the suit was improperly constituted by reason of the omission of the debenture-holders by name, or that one, or ten, or all of the other debenture-holders should have been named as defendants. Indeed, some of these debenture-holders might have adopted a view consistent possibly with fair play towards Mr. Doherty, and might not have cared to raise the question of the validity of his claim. Others might have taken a different view. Mr. Doherty, however, was under no obligation to speculate as to the views held by the different debenture-holders, so long as all were represented in the action before the Court, and provided that there was a person before the Court interested in attacking the validity of the debentures as a charge upon the assets of the company. The plaintiff's statement of claim specifically asked for a declaration that he was entitled to "a good and valid lien on the said debentures, mentioned in the 26th paragraph hereof" . . . (these being the debentures we are now dealing with) "for the amount of his said advances and interest"; and the defendants by their defence, in addition to traversing the issue of these debentures, pleaded that if the issue was made "such issue was ultra vires and void."

It is true that the exact position afterwards taken up in the argument before Mr. Justice Barton, and which formed the substratum of the judgment of the House of Lords, may not, perhaps, have been pleaded in great detail; but the point was

clearly raised that, whether the pledges were good or bad, Mr. Doherty had an unquestionable right to claim through the trust deed. The Court of Appeal was of opinion that the pledges were good, and that Mr. Doherty's claim was valid in its entirety. There then arose a question whether or not the liquidator could of his own motion, and without the leave of the Court below, appeal to the House of Lords. It appears that the liquidator was refused leave to appeal, and when a petition of appeal to the House of Lords was subsequently presented by the company and the liquidator Mr. Doherty presented an interlocutory appeal praying that the former petition of appeal was incompetent. Now, in order to meet that application an affidavit was filed by Mr. Robert Dickie on the 13th June, 1913, in which he sets out the history of the proceedings. I shall read portion of this affidavit:—"Mr. Smyth applied to Mr. Justice Barton for liberty to defend the proceedings on behalf of the second debenture-holders and creditors. The said trustees for the second debenture-holders also applied for leave to defend, but Mr. Justice Barton refused to allow the trustees to defend at the expense of the estate, and appointed Mr. Smyth to defend the action in the name of the distillery company, and I beg to refer to this order dated the 14th December, 1909, which was made in the debenture-holders' action. No further step was taken by the trustees, and the action was defended by Mr. Smyth in the name of the company as provided by the said order. Mr. Justice Barton gave judgment in favour of Mr. Doherty as far as his pledge on the whisky was concerned, but decided that the second debentures which he held as collateral security, and which were issued to him by the company after the commencement of the Companies Act, 1900, were void as against the whisky, inasmuch as they had not been registered pursuant to the provisions of said Act, but held that they were good as regards the leasehold premises, the trust deed securing them having been executed prior to 1900. From this decision the receiver and liquidator appealed to the Court of Appeal, save in so far as the decision was in his favour, and the Court of Appeal (Lord Justice Cherry dissenting) affirmed Mr. Justice Barton on the question of the pledges of the whisky, but gave no decision as regards the validity of the second

Appeal. 1917. Cox v. Dublin City Distillery. Sir Ignatius J. O'Brien C.

debentures which Mr. Doherty held. The result of the decision in this action of Mr. Doherty's is that the pledgees, who were either directors of the company or banks which had been collaterally secured by the personal guarantee of the directors, take almost the entire remaining assets of the company, so that there will practically be nothing available for the ordinary second debenture-holders who paid the full price for their debentures, and certainly nothing for the ordinary creditors of the company. The receiver and liquidator having been advised by eminent counsel both at the English and the Irish Bar that the judgment of Lord Justice Cherry was, in their opinion, the true view of the law, he applied, in the debenture action, to Mr. Justice Barton to allow him to carry the case to the House of Lords. Mr. Doherty's counsel appeared on this application, and opposed same on the grounds that this would be allowing the receiver to fight the pledgees out of money which had been decided was theirs. Mr. Justice Barton took this view, and refused the liberty, *but stated that he would give every facility to the receiver to take the case to the House of Lords, provided that the second debenture-holders, and the creditors for whom he was appearing, provided him with the funds.* The receiver having conveyed this intimation of Mr. Justice Barton to certain of the second debenture-holders who are not pledgees, and to creditors, he was instructed by them to proceed with the appeal at their expense, and he accordingly brought same, and has lodged the £200 security, and has entered personally into a recognizance of £500."

The House of Lords held in favour of the competency of the appeal, and the decision was in favour of Mr. Smyth and the general creditors of the company so far as the question of pledge was concerned, but was against the company and the other debenture-holders, who might desire to defeat Mr. Doherty's claim with regard to the property comprised in the trust deed. The point has now been raised that the Court is not at liberty to look at this statement of Mr. Dickie's for the purpose of ascertaining whether the position now taken up in this memorandum by some of the second debenture-holders is one which entitles them to say they are not bound. I have considered this objection very carefully, but, in my opinion, it would not be in accordance with

natural justice that these other debenture-holders, who now allege that they were pure strangers to these proceedings, could not be confronted with documents showing that they were active litigants, and not strangers. The position technically was that all the second debenture-holders through the trustees were represented on the record, and prima facie the judgment would seem to me to bind all the debenture-holders through those who represented them. I say prima facie, because it has been argued that it is not so. Now, it is most material to see what the trustees did. They were, of course, in the position—to a certain extent an awkward one for them—that they were reluctant to determine whether any particular individual was or was not a cestui que trust of theirs. If what had been done did not give Mr. Doherty a charge, he would not have been one of the cestuis que trust of these trustees; but it would have been a difficult task for the trustees to determine which of the debenture-holders they ought to attack, and which they ought to defend. They accordingly took this course. They entered an appearance in the action, but did not deliver a defence. This would seem to have been the natural course to take. Why? because the issue, so far as the dissentient debenture-holders were concerned, was the same whether Mr. Smyth was the litigant or any other person.

What would have been the position if one of these debenture-holders had applied for leave to be added under Order 16 as a defendant to litigate some point independently? I think that Mr. Justice Barton would have decided as he did, namely, that to avoid further expense, leave to add them should not be given; that the interest of the debenture-holders was amply protected by the person whose interest it must be to destroy the plaintiff's security in toto. The company having put in no defence, the case came on for judgment on admissions as against them, and for trial in the ordinary way so far as the liquidator was concerned. The liquidator raised every objection to the debentures which he could possibly raise, both at the hearing of the action and in the House of Lords, except the point raised in the *Greymouth case* (1). The result was an important success for the

(1) [1904] 1 Ch. 32.

Appeal. 1917.

Cox v. Dublin City Distillery.

Sir Ignatius J. O'Brien C.

second debenture-holders who had guaranteed the costs, although Mr. Doherty succeeded in part.

The matter now comes before the Court in the awkward form of a memorandum. I am entitled to assume that the persons who were anxious to oppose the debentures in toto, and who were unquestionably, as it seems to me, having regard to the cause of the proceedings, represented by the liquidator in the appeal before the House of Lords, must be to some extent the same persons who now claim that they are not bound by the decision of the House of Lords at all, and who say that (although they obtained a substantial advantage by that decision, and succeeded in defeating Mr. Doherty's claim, in so far as it was based on the existence of a pledge of the whisky), there was an omission in not raising the point decided in the *Greymouth case* (1), and that they are now entitled to start afresh, so to speak, in their attack upon these debentures.

A great deal has been said about the question of estoppel, the principle of which has often been made the subject of disapproval from the time of Coke to that of Lord Justice FitzGibbon. For myself I fail to see why this should be so, because it appears to me to afford a convenient means, and sometimes the only means, of defending a position which may be just and fair as between man and man. It appears to me that this whole question was really litigated in the interests of the debenture-holders, though in form by the liquidator, and it would be an unfortunate state of our law if the debenture-holders could escape from the result of these proceedings, and now commence other proceedings de novo. Mr. Justice Barton, however, has acceded to the contention of these debenture-holders, which he considered to be in accordance with the decision in *Hamond* v. *Walker* (2), and the passage which he has cited from the judgment of Fry L.J. in *De Mora* v. *Concha* (3). To say that the second debenture-holders hostile to Mr. Doherty could not be bound unless he made each one a defendant to the action, is a far-reaching proposition, and one which would introduce a great deal of uncertainty into cases like the present. How Mr. Doherty was to discover and select as defendants those who might be

(1) [1904] 1 Ch. 32.
(2) 3 Jur. N. S. 686.
(3) 29 Ch. D. 268, at p. 305.

hostile to him I do not quite know. The contention, however, is that as between them and Mr. Doherty they are entitled to say that they are not bound, because they were not parties to the original proceedings, although the trustees were, and although they could have applied to be added as parties to the proceedings, and did not do so. Why should Mr. Doherty have ignored the provisions of Order 16, rule 8, and have added each of these gentlemen as a defendant to see whether or not he would dispute his claim? I do not say that there may not be cases in which the fact that trustees are parties may not prevent litigation of rights between cestuis que trust themselves; trustees may be added solely for the purpose of technically representing the estate, and there may be room for the operation of this suggested principle in such a case, but the present case is not one of that class, and I do not understand the dictum of Fry L.J. in *De Mora* v. *Concha* (1) as deciding any such unfortunate proposition as that in such a case as the present all the debenture-holders should have been made defendants. The suit was, in my judgment, properly constituted, the trustees being named as defendants, and if any particular debenture-holder wished to be separately represented he should have applied to the Court for liberty to defend.

The appeal to the House of Lords was one promoted in the interests of the second debenture holders other than Mr. Doherty—those who were not holders of pledges. The general assets of the company could not have been, as I understand the figures, enhanced to the extent of one penny by the success of the appeal. The appeal was brought in substance for the benefit of these other debenture-holders, and I consider that I am entitled in the interests of justice to look at the documents filed in that matter to see that this was not the fact.

The case of *Concha* v. *Concha* (2) has been strongly pressed upon us as a binding authority in favour of the respondents, but I cannot accede to this contention. The question that arose in that case was as to whether a certain decree of the Probate Court in 1860 was conclusive in rem on a question of domicil. [His Lordship referred to the facts of the case, and continued.] It was there

(1) 29 Ch. D. 268. (2) 11 A. C. 541.

Appeal. 1917. Cox v. Dublin City Distillery. Sir Ignatius J. O'Brien C.

carefully pointed out in the judgments of the Court that this question of domicil was one not necessary to be determined in the application made to the Probate Court, and it was also pointed out by Lord Blackburn (p. 561) as a matter of importance in considering the effect to be given to the judgment of Sir Cresswell Cresswell, that by the Probate Act of 1857 the jurisdiction of the judge of the Probate Court was altered, the former jurisdiction over suits for distribution being taken away, and vested from that time solely in the Court of Chancery.

In the present case the Court had not only jurisdiction to entertain the question whether Mr. Doherty had a valid charge on the property comprised in the trust deed, but was bound to exercise that jurisdiction, and the resulting judgment was, to my mind, a judgment binding on all parties who were made amenable to the procedure.

The case of *Concha* v. *Concha* (1) to my mind has no application.

The case of the *Irish Land Commission* v. *Ryan* (2) has also been relied on by the respondents, but appears to me to be clearly distinguishable. Lord Justice Holmes in that case points out clearly the essential difference between a case like the *Irish Land Commission* v. *Ryan* (2), where there was a default of appearance to the writ, and judgment was entered in the office, and a suit like that which we are now considering, where we have a specific claim of Mr. Doherty clearly pleaded in the statement of claim, an appearance entered by the trustees, a hearing in Court, and a judgment entered which is a matter of record. It appears to me a startling proposition that a plaintiff who has delivered a statement of claim setting forth his cause of action is in a worse position when the defendant fails to file a defence than he would be in if a mere bogus defence were put on the file of the Court which the defendant could not subsequently substantiate. The defendant who does not file a defence admits the averments in the statement of claim, but the plaintiff cannot by reason of this obtain judgment in the office; he must apply to the Court, and the Court determines what judgment is proper to be entered.

(1) 11 A. C. 541. (2) [1900] 2 I. R. 565.

Appeal.
1917.
Cox
v.
DUBLIN CITY DISTILLERY.
Sir Ignatius J. O'Brien C.

In the present case the Court had before it a perfectly clear statement of claim, claiming a right against the property comprised in the trust deed, the trustees being before the Court. The Court determines what the effect is of the failure to deliver a defence, and says that there is an admission that the plaintiff's claim is a valid one against the property comprised in the deed. What more could the plaintiff do? If the argument based on the supposed effect of the decision in the *Irish Land Commission* v. *Ryan* (1) is sound, it appears to me that the entire procedure in Mr. Doherty's action is rendered futile. I do not consider that the *Irish Land Commission* v. *Ryan* (1) is an authority in favour of the respondents. At p. 572, Lord Justice FitzGibbon said:—"That a judgment by default has an operation by estoppel cannot be denied; but the ground and extent of that estoppel must, in my opinion, be found on the face of the judgment itself, and cannot be inferred or deduced from the pleading of the party who has obtained the judgment, when the defendant has said nothing, and done nothing, and has merely allowed the judgment to go by default." Athough this passage is relied on by the respondent, the learned Lord Justice clearly recognizes that a judgment by default may operate as an estoppel, and when, as in the present case, we find, on looking at the record, a complete statement of the plaintiff's claim, and a judgment entered in open Court based on admission of that claim by the defendants in not delivering a defence, that judgment must, in my opinion, operate as an estoppel.

In conclusion I shall refer to the judgment of Palles C.B. in *Cox* v. *Dublin City Distillery* (*No. 2*) (2). At p. 372 the learned Chief Baron says:—"This brings me to the third question, viz., whether the judgment in *Doherty* v. *Kennedy* (3), a decision between a second debenture-holder and the company, estops the valid second debenture-holders from alleging that certain of those second debentures not specially represented in that suit are invalid. Now, I do not wish to be misunderstood. I hold that as between Doherty, the plaintiff in that suit, and the company and the second debenture-holders, the whole matter as to the validity

(1) [1900] 2 I. R. 565.
(2) [1915] 1 I. R. 345.
(3) [1912] 1 I. R. 346, 363; [1914] A. C. 823.

Appeal. 1917. Cox v. Dublin City Distillery. Sir Ignatius J. O'Brien C.

of Doherty's claim is res judicata. The second debenture-holders as a class were represented in that action by their trustees, and therefore the second debenture-holders are estopped from raising, *as against the plaintiff in that suit*, not only any defences which they did raise in that suit, but also any defence which they might have raised, but did not raise therein." This to my mind is an accurate statement of the effect of the decision in the former case in regard to the question argued before us in this appeal.

I am of opinion that the order appealed against was wrong, and that the appeal must be allowed.

RONAN L.J.:—

It appears to me that there are really three questions in the case:—

1. Did the House of Lords decide in *Doherty's Case* (1) that Doherty was a cestui que trust under the trust deed?

2. Did they succeed by that order in giving effect to their decision?

3. If questions 1 and 2 are answered in the affirmative, are the respondents estopped by the decision and order of the House of Lords from asserting that Doherty is not a cestui que trust under the deed, and entitled to the benefit thereof as a security for his advances to the company?

The third question is mainly a question as to whether Doherty's action was properly constituted as to parties. It does not arise if either 1 or 2 is answered in the negative. I shall, therefore, in the first instance consider 1 and 2 entirely apart from the question of parties or estoppel.

This is a proceeding in the winding-up of the Company, the object of which is to ascertain whether Doherty is entitled to prove in the winding-up as a secured creditor on foot of the security created by the deed. The debentures gave a security as a floating charge on the property of the company other than that comprised in the deed. The deed is an ordinary mortgage of land to a trustee upon trust for persons described in it. In my opinion it is clear that in *Dublin City Distillery, Ltd.*, v. *Doherty* (1) the House of Lords at all events intended to decide—1, that the

(1) [1914] A. C. 823.

trust deed was good against the liquidator; 2, that Doherty was a cestui que trust under the trust deed. At p. 859 Lord Parker says:—"The question arises whether, notwithstanding such want of registration, the respondent is not entitled to the benefit of the trust deed pari passu with the other holders of second debentures. I have come to the conclusion that he is so entitled. As a holder of second debentures he is a cestui que trust under the trust deed, which itself is good as against the liquidator though unregistered. His debentures are not entirely avoided by the 14th section, even against the liquidator, but avoided only so far as any security on the company's property or undertaking is thereby conferred. In my opinion the security to which the respondent claims title is, so far as the property comprised in the trust deed is concerned, conferred by such deed and not by the debentures. Even if the debentures had not referred to the trust deed, the respondent would have been a cestui que trust thereunder."

The above portion of this judgment is expressly adopted by Lord Sumner at p. 868. Lord Atkinson at p. 851 gives judgment to the same effect. The judgment does not decide the amount due to Doherty on foot of the security created by the deed. It only decides that the deed is good, and that he is a cestui que trust under it. This seems to me to dispose of question No. 1, which must be answered "yes."

As to question No. 2, the order of the Court of Appeal affirmed the judgment of Barton J. That judgment declared "that the plaintiff is entitled to a good and valid lien on the debentures mentioned in the 26th paragraph of the statement of claim so far as the same affect the freehold and leasehold premises comprised in the trust deed, dated the 9th November, 1895, for the amount of his advances." The order of the House of Lords (1) is as follows:—"Order of the Court of Appeal in Ireland reversed, save so far as it affirmed that portion of the order of Barton J., which declared." [And then the above declaration is set out in terms.]

There can be no doubt as to the meaning of the words "so far as the same affect"; they mean "so far as the debentures affect," not so far as "the lien affects." I mention this because

(1) [1914] A. C. 868.

Appeal. 1917. Cox v. Dublin City Distillery. Ronan L.J.

in his judgment in *Cox* v. *Dublin City Distillery* (*No.* 2) (1), Barton J. reads "affects" for "affect," which would make the words "the same" refer to the lien and not to the debentures. The debentures were issued to Kennedy as trustee for Doherty. Kennedy was a defendant. The debentures were in his name, but he held them as trustee to secure Doherty's advances. The holders of debentures were cestuis que trust of the trust deed. The plain meaning of the declaration was that Doherty was entitled to rank as a cestui que trust of the deed, and to have the benefit thereof as a security for his advances. If the declaration did not mean that, it was meaningless. I have referred to this at an early stage, as I am by no means sure that Mr. Justice Barton's judgment in the present case does not involve the proposition that Doherty's case really decided nothing. If it did not decide what Lord Parker purported to decide, I am unable to discover what it did decide. This is quite distinct from the question on whom the decision is binding. This latter question assumes that something was decided. Questions 1 and 2 would equally arise if all the second debenture-holders had been defendants in *Doherty's Case* (2). As to questions 1 and 2, the result of *Doherty's Case* (2) is stated with great precision by Barton J. in his judgment in *Cox* v. *Dublin Distillery* (1), thus:—"In paragraph 26 of the statement of claim and clause 5 of the prayer the plaintiff alleged the material facts upon which his claim to a charge on these debentures was based, and prayed for a declaration of his right to a good and valid lien on the debentures. The defendants in paragraph 15 of the statement of defence pleaded that the issue of these debentures was void. That is what this Court is asked to decide to-day. The question which is raised upon this memorandum was open under that plea. No contentious question of fact was raised about the debentures, but questions of law were raised; and it was held that a valid charge was created upon the premises comprised in the debenture trust deed, and a declaration was made in this Court to that effect. The company appealed upon that point unsuccessfully to the Court of Appeal and to the House of Lords. The order in the House of Lords expressly affirmed, and protected the plaintiff as regards the costs of, that portion of the order of

(1) [1915] 1 I. R., at p. 356. (2) [1914] A. C. 823.

this Court which declares that the 'respondent (Doherty) is entitled to a good and valid lien on the debentures mentioned in the 26th paragraph of the statement of claim, so far as the same affects (error for 'affect') the freehold and leasehold premises described in the trust deed.'"

In favour of whom was this valid charge upon the premises created? Beyond all possible doubt, in favour of Doherty.

This statement of Barton J. in my opinion shows plainly, 1, that the effect of the decision in his opinion was that Doherty had a valid charge on the premises comprised in the trust deed, and 2, that the effect of this was what he intended by his declaration. The House of Lords adopted both the substance of the decision and the form of the declaration. If the allegations as to the issue of the debentures in paragraph 26 had not been proved or admitted, Doherty's action must have been dismissed. A judgment in his favour necessarily involved that he was the lawful holder of valid debentures. The valid charge could only be created in favour of Doherty if he was the holder of valid debentures either personally or through his trustee. In the next paragraph of this judgment (1), however, Barton J. substitutes for "a valid charge upon the premises comprised in the debenture trust deed" "a chargeant on the debentures," and then says that he expresses no opinion on the validity of Mr. Doherty's debentures, as their validity was not open upon the memorandum. Does he mean by this that all that he, the Court of Appeal, and the House of Lords decided was that Doherty had a charge on certain pieces of paper, but that there never was any decision that he had any charge on the trust premises, or that he was a cestui que trust under the deed? This seems an extraordinary proposition to impute to the learned judge; but, after the most careful consideration, I can put no other meaning on his judgment in the present case. He says (2): "I must add that there is another serious difficulty in the way of this plea of estoppel. What Mr. Doherty, in the action of *Doherty* v. *Kennedy* (3), sought to obtain, and succeeded in obtaining, was not a declaration as to the validity of the debentures, but as to

(1) pp. 356, 357.
(2) Ante, p. 207.
(3) [1912] 1 I. R. 349, 363.

Appeal. 1917. Cox v. Dublin City Distillery. Ronan L.J.

validity of his lien on them for his advances, and an inquiry as the amount of those advances and the sums available for discharging them. That declaration is not inconsistent with the present application. The validity of the debentures was never in dispute. It was not raised, argued, or decided in that suit." This certainly is a startling statement. It follows from it that Doherty's action, which was instituted (so far as the present matter is concerned) to determine his right to prove as a secured creditor on foot of the debentures and the trust deed, did not raise that question at all; it really decided nothing, though the three tribunals apparently thought it did.

Further, what was *Cox* v. *Dublin City Distillery* (*No. 2*) (1) all about? "A test action," which decided nothing, except perhaps that Kennedy held some papers as trustee for Doherty.

It is strange that in his judgment Barton J. does not even mention this case of *Cox* v. *Dublin Distillery* (*No. 2*) (1), before himself and the Court of Appeal. In that case Churton, Trower, and Kennedy contended that they were entitled to prove as secured creditors under the trust deed. Their case was that the judgment in Doherty's action established his right to do so, and that it was a test action, and that they were entitled to the benefit of the judgment. The case occupied apparently two days at argument before Barton J., and three days before the Court of Appeal. Judgment was reserved in both Courts. Barton J. held that the judgment in *Doherty's Case* (2) could be relied on by way of estoppel by Kennedy, but not by Churton or Trower. The Court of Appeal held that neither Kennedy, Churton, nor Trower could so rely on it. It is obvious that if Doherty's judgment did not establish his right, the entire proceeding in the case was futile. In such a case it would be absurd to discuss whether third parties could take advantage of a decision without first ascertaining what the decision was. Accordingly, in the Court of Appeal it is clear that the Court held and decided two propositions, viz.: 1, that *Doherty's Case* (2) did establish Doherty's title as a cestui que trust of the trust deed; and 2, that *Doherty's Case* (2) was not a test action, and that no one else could avail himself of it as such. The Lord Chief Baron and the Lord Chief Justice expressly say

(1) [1915] 1 I. R. 345. (2) [1914] A. C. 823.

so. I think that the same propositions are involved in the judgment of Molony L.J., and he tells me that he intended his judgment to have this effect. I accept the decision of the Court of Appeal as a binding authority on the effect of the decision and order in *Doherty's Case* (1), but for the present apart from the question of estoppel and that of parties. This brings me to my third question.

The main point as to this third question is, whether it is now open to the second debenture-holders to dispute Doherty's right to be dealt with as a cestui que trust under the deed. In my opinion *Cox* v. *Distillery* (*No. 2*) (2) is a clear authority on this as well as on the other two questions in the case. At p. 372 the Lord Chief Baron states what he decides in the case in the following words. [His Lordship read the passage from the judgment of the Lord Chief Baron, quoted by the Lord Chancellor, ante, p. 223.] This short paragraph, in the most accurate and precise legal language, states not only his decision, but the grounds of his decision, and, in my opinion, it rules the present case on every point. At p. 367 the Lord Chief Justice says that "the House of Lords have adjudicated upon Doherty's claim, and Doherty's claim only." He suggests, no doubt, that it was a complete and final adjudication on the validity of Doherty's claim as a secured creditor under the deed.

I can find nothing in the judgment of Molony L.J. expressing any dissent from what had been said by the Lord Chief Justice and the Lord Chief Baron. He says, at p. 378: "The decision in Doherty's action is, of course, binding and conclusive on the parties to the record" (the liquidator and the trustees of the deed); "but the debentures *here*" (that is, not Doherty's debentures, but those of Kennedy, Trower, and Churton—see per Palles C.B., at p. 372) "are impugned by other debenture-holders of the same class, and they are entitled to show that the debentures" (again those of Kennedy, Trower, and Churton) "were not validly issued." This is entirely in accord with the judgments of the Lord Chief Justice and the Lord Chief Baron.

The following paragraph (3) in the judgment of Molony L.J. has been strongly relied on:—

"It has been pointed out that the trustees for the second

(1) [1915] 1 I. R. 345. (2) [1914] A. C 823. (3) [1915] 1 I. R. 378.

Appeal. 1917. Cox v. Dublin City Distillery. Ronan L.J.

debenture-holders were parties in the action; but it is clear that trustees will not be deemed to represent the interest of absent cestuis que trust on any contention amongst the cestuis que trust inter se, but only where the contention is between a stranger and all the cestuis que trust: *Hamond* v. *Walker*" (1).

I presume there was considerable argument on the extent to which trustees represent their cestuis que trust, but the paragraph is expressly confined to contentions amongst the cestuis que trust inter se. This can have no application to a case where the only claim is a claim to be a cestui que trust. Until that claim had been decided in favour of the claimant, the paragraph can have no application to him. Molony L.J. intimates no doubt as to the correctness of the view of the Lord Chief Baron that in this case the trustees represented all the second debenture-holders, and that they are bound by the decision. I, therefore, accept the judgments as deciding the reverse of what Barton J. has held in the present case.

Frederick Hans Kennedy and William Findlater were trustees for the debenture-holders only to a limited extent. So far as regards the floating charge created by the debentures they were not such trustees; they had really no duties to perform in respect of the debentures. If a debenture holder released the lands comprised in the deed from his charge, and confined it to the other assets of the company, they would no longer be trustees for him. They were in fact trustees for the persons who were "entitled to the benefit of the trust deed, and it was their duty not to give the benefit of that deed to parties who were not cestuis que trust under it." The judgment in the case only dealt with the rights of Doherty under the trust deed.

If he is a cestui que trust under a valid mortgage of the company's land, he is entitled to prove as a secured creditor. The judgment decides that he is a cestui que trust. It decides no question between the cestuis que trust under the deed. It only decides that he is *one* of them.

There are two classes—1, those who are cestui que trust under the deed; 2, those who are not. There is no third class. The trustees are trustees for 1 and for all of them, and not for 2.

(1) 3 Jur. N. S. 686.

It is the duty of the trustees to confine the benefit of the deed to 1, and not to permit 2 to take any part of it.

If the cestuis que trust dispute inter se as to their respective rights to the benefits of the deed, the trustees are not arbitrators to decide between them. They should not take sides with one set of cestuis que trust against the others. If A is trustee of a fund for B, C, D, and E, and they dispute among each other as to their rights to the trust fund, it would be absurd to suggest that B in an action against the common trustee A alone, should be allowed to obtain a decision as against C, D, and E. In such a case the Court would, of course, insist on their being separately represented. Barton J. refers to the provision in Order 16, Rule 8, enabling this to be done; but he seems to overlook the fact that neither he nor the Court of Appeal nor the House of Lords thought it necessary to have the parties separately represented in *Doherty's Case* (1). But before this state of things can arise there must be a common trustee, and the dispute must be among his cestuis que trust. If F, a fifth person, claims to be a cestui que trust, and his right is disputed, a wholly different state of things arises. If his claim is admitted or established, it diminishes the fund divisible among B, C, D, and E just as much as if a stranger appropriated an amount equal to the share which F proved he was entitled to. Once F had established that he was a cestui que trust, any question between him and his co-cestuis que trust as to their respective shares would be what Molony L.J., in *Cox's Case* (*No.* 2) (2), calls "a contention among the cestuis que trust inter se." But until it was settled that he was a cestui que trust this position could not arise as to him. It was the duty of the trustees to hold the entire trust fund for persons who were cestuis que trust, and not to allow anyone else to participate in it. I have already pointed out that Doherty's action, so far as regards the present matter, was an action to establish his right as a cestui que trust under the deed, and to prove as such in the liquidation, and that the judgment in the action only established that right. It did not decide any question between him and his co-cestuis que trust, except that he also was a cestui que trust.

(1) [1914] A. C. 823. (2) [1915] 1 I. R. 345, at p. 356.

Appeal. 1917. Cox v. Dublin City Distillery. Ronan L.J.

Reading this judgment one would think that there never was any dispute that Doherty was a cestui que trust under the trust deed, or, indeed, any dispute as to the full claim in paragraph 26 of the statement of claim, and paragraph 5 of the prayer.

Barton J. says (1) that the question of the pledge "was the only contentious question in the action. He" (Doherty) "did not claim adversely to the trust estate in respect of these debentures, but as a cestui que trust he claimed the benefit of the trust deed. That being so, the trustees for the second debenture-holders cannot be regarded as having constituted a legitimus contradictor on behalf of the applicants, so as to preclude them from challenging the validity of these debentures. . . . The validity of the debentures was never in dispute. It was not raised, argued, or decided in that suit." I confess I cannot understand this. The Judge refers to paragraph 26 of the statement of claim as containing the plaintiff's claim in respect of the present matter. But this is all specifically traversed by paragraph 15 of the company's defence, as pointed out by himself in his judgment in *Cox* v. *Dublin City Distillery* (*No.* 2) (2). He himself decided that the debentures in question were invalid so far as they purported to give a floating charge, and he cut down the plaintiff's claim to that under the trust deed; but as to this, held that they had still the effect of entitling the plaintiff to the benefit of the trust deed. Paragraph 3 of the argument for the appellant in *Dublin City Distillery, Ltd.*, v. *Doherty* (3), at page 831 of the report, and paragraph 3 of that for the respondent at page 834, show that this was fully argued in the House of Lords. And, lastly, the careful judgment of Lord Parker, quoted above, and the concurrence of the other lords, show that this was treated as a grave question in the action. Barton J., in his judgment in this action, says: "Doherty . . . as a cestui que trust claimed the benefit of the trust deed. That being so," (1) etc. Prior to the decree, Doherty claimed to have it decided that he was a cestui que trust under the deed. Until that was decided he could not claim as a cestui que trust. The question in the case was in fact, Was he such a cestui que trust? When it was decided that he was, then, but not before, could he claim as a cestui que trust, who

(1) Ante, pp. 207, 208. (2) [1915] 1 I. R. 345, at p. 356. (3) [1914] A. C. 823.

must be recognized as such by the trustees and the liquidator. Once the validity of the trust deed was established, in my opinion it is plain that the only question in dispute in the action, as regards this branch of the case, was whether Doherty was a cestui que trust under that deed, and the judgment of Lord Parker, in so many words, decides that he was.

As to the question whether a person is a cestui que trust under the deed or not, Barton J. seems to suggest that the trustees are not under any obligation to consider this. His judgment proceeds:—"Indeed the trustees do not appear to have been under any obligation to raise it. Their duty under the terms of clause 6 of the trust deed was to apply any moneys arising from the sale under the trust for conversion contained in the deed towards payment pari passu without preference or priority of arrears of interest and principal to the holders of second debentures according to the tenor of their debentures." Now, I presume that this means that their duty is simply to pay according to the tenor of the debentures, and that there is no duty cast on them except to regard the tenor of the debentures; they are not bound to consider whether the persons they pay are holders of valid debentures. This is an entire misreading of the clause. The trusts are—(1) to pay to the holders of debentures pari passu, in proportion to the amount due, the arrears of interest remaining unpaid; and (2) the principal. The clause then provides that this shall be done "*whether the said principal moneys shall or shall not be payable according to the tenor of the said debentures.*"

So far from the payment being directed to be according to the tenor of the debentures, the clause provides that the tenor of the debentures is not to regulate the payment. Now, it is quite true that the point showing that the debentures were issued by persons who were not authorized to do so was not relied on at the trial before Barton J. or in the Court of Appeal. The point appears to have been discovered by the present Mr. Justice Younger, who was counsel for the appellants in the House of Lords.

Even if the House of Lords intended to decide that Doherty was a cestui que trust under the deed, and entitled to prove as a secured creditor, and their order gave effect to this decision, still if Barton J. is right on the question of estoppel, this decision had

Appeal. 1917. Cox v. Dublin City Distillery. Ronan L.J.

really no operative effect on the assets of the company or the trust premises in the trust deed of which he was decided to be a cestui que trust. It certainly is a most extraordinary situation. When Mr. Justice Younger called the attention of the House of Lords to the facts as to the issue of the debentures, it never occurred to him, or any of the Lords, or anyone else, that it was a pure waste of time to argue the case, as, having regard to the frame of the action, their judgment would be wholly inoperative. Mr. Younger said that if this point had been taken in time it would have put an end to this part of the case; but that he could not rely on it because it had not been raised in either of the Courts below, *not* because it was not open on the pleadings in the action. It was a defence to the entire action, so far as this case is concerned, open on the traverse in the pleadings, but not taken at the trial.

The first ground on which Barton J. decided the case was that the trustees of the deed did not represent their cestuis que trust in *Doherty's Case* (1) so as to make the judgment bind the latter. If they did not so represent them, I asked counsel for the respondent whether the judgment had any effect at all by reason of the trustees being defendants. I pointed out that it clearly did not bind the trustees' own property, and they practically had to admit that it had no operation whatever beyond what it would have had if the trustees had not been parties. This is rather startling, having regard to Order 16, Rule 8 (following sect. 42, sub-s. 9, of the English Chancery Regulation Act of 1852 and sect. 66 of the Chancery (Ireland) Act, 1867).

It will be observed that the mandatory words "shall be considered as representing" are not to be found in rule 9. When rule 8 provides that trustees who sue or are sued as representing the estate of which they are trustees without the joinder of the persons beneficially interested "shall be considered as representing such persons," it means that the trustees shall be considered as representing these persons. If there be a conflict of interest amongst the cestuis que trust, provision is made for this. The rule proceeds:—"But the Court or a judge may at any stage of the proceedings order any of such persons to be made parties either in addition to or in lieu of the previously existing parties."

(1) [1914] A. C. 823.

The Law Lords had before them all the facts as to this point which is sought to be raised here; they knew what was involved in the case; and that the point, if taken in time, would have been fatal in this respect. They did not, however, think it necessary to interfere with the ordinary operation of Order 16, Rule 8, as to the trustees representing the persons beneficially entitled.

The case of *Concha* v. *Concha* (1), which was pressed upon us by the respondents, and which the Lord Chancellor has already referred to, is clearly distinguishable. Lord Herschel there said (at p. 553):—"It cannot be questioned that for certain purposes the executors do represent the legatees and the residuary legatee; and it may, perhaps, be admitted (at all events for the purposes of this case) that so far as regards all matters necessarily decided in a suit to which the executors are parties, the residuary legatee and the other legatees may be bound by the decision. But I think that must be limited to the matters necessarily decided in the litigation to which the executors are parties, and that if the executors choose, as it is said here they have chosen, to obtain a decision of the Court upon a point which is immaterial for the purpose of determining the rights in question between the parties, they cannot, by tendering for decision an issue which is unnecessary for the determination of the case, bind all parties claiming under the will, legatees of whatever description, because that finding has been obtained in such a suit under such circumstances by the executors. That really is the present case. If the residuary legatee is bound here at all, he is bound by a finding of the learned judge, which was quite unnecessary for the determination of what he had to decide, and by a finding of the learned judge which therefore could not be successfully appealed against." The finding of the Probate Court on the question of domicil was accordingly held to be not conclusive in that case, it having been an irrelevant finding. Here, however, the question as to Doherty's rights as a cestui que trust under the trust deed was one which, in the words of Lord Herschel, was "necessarily decided in the litigation," and was, indeed, the vital question in the case.

We have not been referred to any case in which, in an action brought against trustees for a class by a person claiming to be a

(1) 11 A. C. 541.

Appeal. 1917.

Cox v. Dublin City Distillery.

Ronan L.J.

member of that class, it was held that the trustees did not represent the class. Here the trustees represented all the second debenture-holders. Doherty was claiming as an outsider until his right was established. If he was a cestui que trust, the trustees represented him; if he was not a cestui que trust, they did not.

The remaining question is as to the effect of the decision in the *Irish Land Commission* v. *Ryan* (1), with which the Lord Chancellor has already dealt. The dictum of FitzGibbon L.J. in that case, which appears in the head note (paragraph 5) as if it were the judgment of the Court and the basis of the decision, and which the Lord Chancellor has read, does not seem consistent with the judgment of Holmes L.J. I do not, however, think it necessary to discuss the matter in detail, as in the present case "the ground and extent of the estoppel" are clearly and fully to "be found on the face of the judgment itself."

If the judgment in this case be compared with the facts set out on p. 566 of the report in [1900] 2 Irish Reports, it will be seen that the *Irish Land Commission* v. *Ryan* (1) has really no bearing on the present case.

In conclusion, I may say that the decision of this Court in *Cox* v. *Dublin City Distillery* (*No. 2*) (2) is, in my opinion, a clear and binding authority, and the specific statement of the Lord Chief Baron, to which I have already referred, appears to me to cover every question in the present case.

Molony L.J.:—

The appellant, Edward Doherty, on 6th December, 1909, commenced an action against Frederick Hans Kennedy, William Findlater, and the Dublin City Distillery, Limited, to have it declared that he was entitled to a good and valid pledge of the whiskies contained in certain casks therein referred to, and also that he be declared entitled to a good and valid lien on certain second mortgage debentures of the said company, for the amount of his advances to the company, with interest. The defendants Kennedy and Findlater were sued as trustees for the said deben-

(1) [1900] 2 I. R. 565. (2) [1915] 1 I. R. 345.

ture-holders under an indenture of 9th November, 1895, whereby certain hereditaments and premises the property of the company were assigned to them as such trustees. A defence was filed by Samuel Smith, the receiver and liquidator of the company, who defended the action in the name of the company pursuant to an order of Mr. Justice Barton of the 14th December, 1909, and, amongst other defences, he pleaded that if such issue of second debentures was made as alleged, such issue was ultra vires and void, and in a notice served subsequent to the claim he further stated that the defendant company, in support of the plea that the said second debentures were ultra vires and void, would rely on the fact that the said issues of second debentures were made after the Companies Act, 1900, came into operation, and were not registered pursuant to that Act. Messrs. Kennedy and Findlater, the trustees, did not put in any separate defence, but it appeared in the course of the proceedings, and was in fact admitted, that the action was defended by the liquidator in the interests of the second debenture-holders, and, so far as the subsequent appeal to the House of Lords was concerned, with their active co-operation and financial support. On the 27th January, 1911, Mr. Justice Barton gave judgment, holding that there was a good and valid pledge of the whisky comprised in the warrants, and also holding that Doherty was entitled to a valid lien on the debentures for the amount of his advances, to the extent of the property comprised in the trust deed. The judgment was affirmed by this Court, and on an appeal being taken to the House of Lords it was decided that there was no valid pledge of the whisky, but that there was a valid lien. The trustees for the second debenture-holders had a two-fold duty to perform. They were bound to assert the validity of the deed and enforce its provisions as against the company; but they were equally bound to see that no person came to share in the trust property who was not legally authorized to share in it. When they were sued as trustees by a person claiming to have a valid lien in respect of certain debentures issued to him by the company, the trustees, as representing all the debentures of that class, were entitled to require the existence and validity of the debentures to be proved in the proceedings. The trustees cannot be placed in a better position by reason of not having in fact

Appeal.
1917.
Cox
v.
Dublin City Distillery.
Molony L.J.

delivered a defence, and the question of estoppel does not depend on whether the question was actually raised, but on whether it could have been properly raised in the proceedings. The company did raise the issue that the debentures were void. In *Doherty's Case* (1) it was perfectly open to the trustees to question the validity of the issue of the debentures; but having allowed the case to be carried to the House of Lords on the assumption that they were validly issued, although subsequently avoided as regards the floating security by reason of the provisions of the Companies Act, 1900, not having been complied with, it is impossible, I think, for the second debenture-holders now to claim that they are not bound by the proceedings in the action or by the judgment of the House of Lords.

After the decision of the House of Lords the second debenture-holders took proceedings in the present action to have certain debentures issued to Frederick Hans Kennedy (as trustee for Frederick Kennedy), Percy Bence Trower, Percy Vardon Churton, Adam S. Findlater, and William Findlater declared invalid on the ground that the resolution authorizing the issue was invalid, having been passed at a meeting at which there was no quorum competent to vote on the resolution. Mr. Justice Barton held that the debentures to Trower and Churton were void, but that the debentures to Frederick Kennedy, Adam S. Findlater, and William Findlater were valid, and this Court varied his order by declaring that the debentures to Frederick Kennedy were also void. It was argued that the action of *Doherty* v. *Kennedy* (1) was a test action brought on behalf of all the holders of the second debentures, and that they were entitled to rely upon the judgment in that case. This Court, however, was clearly of opinion that the action was not a test action, and that it only dealt with the validity of Doherty's debentures. In the course of my judgment I pointed out that while the decision in *Doherty's Case* (1) was, of course, binding and conclusive on the parties to the record, the debentures which were the subject of that appeal were impugned by other debenture-holders of the same class, and that they were entitled to show that the debentures were not validly issued. The reference which

(1) [1914] A. C. 823.

I made to the case of *Hamond* v. *Walker* (1) seems to have been misunderstood. I pointed out that it would appear from that case that trustees will not be deemed to represent the interests of absent cestuis que trust on any contention between the cestuis que trust inter se, but only where the contention is between a stranger and all the cestuis que trust. It seemed to me that the statement of V.-C. Page-Wood in *Hamond* v. *Walker* (1) was correct, but I was not in any way differing from the judgment of the Lord Chief Baron, or his conclusions of law, with which I respectfully concur. There was not in *Doherty's Case* (2) any contention amongst the cestuis que trust inter se; but there was a contention between persons who were admitted to be valid debenture-holders and certain persons, the validity of whose debentures was impeached; and it was perfectly within Order 16, Rule 8, that the trustees should represent all the valid cestuis que trust, as it was their interest to prevent any person who was not properly entitled from claiming the benefit of the trust deed; and there was no contention between valid cestuis que trust inter se. I am of opinion, therefore, that, having regard to the proceedings in *Doherty* v. *Kennedy* (2), and the judgment of the House of Lords, the order appealed from should be discharged, and that we should declare that the applicants are precluded from now averring the invalidity of the debentures held by Frederick Hans Kennedy as trustee for Edward Doherty.

Solicitor for the appellant: *H. W. Franck.*
Solicitors for the respondents: *G. D. Fottrell & Sons.*

R. ST. J. C.

(1) 3 Jur. N. S. 686.

(2) [1914] A. C. 823.

M. R. 1917. March 27.

In re PROVIDENT ASSOCIATION OF LONDON, Ltd., and GOLLOGALY'S CONTRACT.

(1917. No. 258.)

Vendor and Purchaser — Objections to Title — Emergency Legislation — Mortgagee in Possession—Power of Sale—Courts (Emergency Powers) Act, 1914 (4 & 5 *Geo.* 5, *c.* 78), *sect.* 1, *sub-s.* 1 (*b*).

The expression "mortgagee in possession" in sect. 1, sub-s. 1 (*b*), of the Courts (Emergency Powers) Act, 1914, means a mortgagee who has taken possession without leave of the Court.

Summons.

By an accepted proposal, dated February 1st, 1917, Peter Gollogaly agreed to purchase from the Provident Association of London, Limited, the leasehold premises, 71, Philipsburg-avenue, in the city of Dublin, for the sum of £230. The proposal stated, as the fact was, that the sale was made by the vendors under their powers as mortgagees by virtue of an indenture of mortgage, dated October 29th, 1906, made between Arthur John Griffin of the one part and the vendors of the other part, whereby the premises were demised to the vendors for the residue (except the last three days thereof) of the term granted by a lease, dated September 28th, 1906, between William Maxwell Thompson of the one part and Arthur John Griffin of the other part, being a term of 890 years, from September 28th, 1906, at the yearly rent of £6 10*s*. The abstract of title stated the lease, the mortgage, and an order of the Master of the Rolls, dated October 30th, 1916, made in the matter of the Courts (Emergency Powers) Act, 1914, in an action in which the vendors were plaintiffs, and Arthur John Griffin was defendant, giving liberty to the plaintiffs to realize the security comprised in the mortgage by entering into possession or receipt of the rents and profits comprised in the mortgage, and that the vendors duly entered into receipt of the rents and profits of the premises and were mortgagees in possession. That order was made on the application of the vendors by summons, dated September 22, 1916, that notwithstanding the provisions of

sect. 1, sub-s. 1 (*b*), of the above-mentioned Act, the applicants might be at liberty to exercise the following remedy for enforcing the payment or recovery of money by or from the defendant, or, in default of such payment or recovery, that is to say, to enter into possession or receipt of the rents and profits as mortgagees under an indenture, dated October 24th, 1916, made between the defendant of the one part and the vendors of the other part, of the property comprised in the said indenture of mortgage, that is to say, the piece of ground with the buildings erected thereon known as No. 71, Philipsburgh-avenue, in the barony of Coolock and county of Dublin. The application was grounded on an affidavit of the loan manager of the vendors, stating the mortgage, that £242 16*s.* 1*d.* was due for principal and interest by the defendant to the mortgagees, that he had been applied to, and had declined to pay the arrears of interest. There was no appearance for the defendant.

On receipt of the abstract, the purchaser objected to the title, on the ground that the order of October 30th, 1916, did not give the vendors leave to realize the security by a sale, and required that the order should be amended by giving leave to sell, or that the mortgagor should join in the assignment to the purchaser. The vendors submitted that no amending order was necessary under the terms of sub-s. 1 (*b*) of the Courts (Emergency Powers) Act, 1914, and that the mortgagees having entered into possession, their ordinary right to sell was not restricted by the Act, the sale being a sale by a mortgagee in possession; and they declined to comply with the requisition.

A summons was taken out by the purchaser under the Vendor and Purchaser Act, 1874, to have it declared that the requisitions and objections of the purchaser in respect of the title had not been sufficiently answered, that a good title had not been shown, and asked for repayment of the deposit of £23, together with interest thereon at four per cent. from February 1st, 1917, until payment, and for the cost of investigating title and of the application.

James Henry, in support of the summons.

The order of October 30th, 1916, only authorizes the mortgagees to go into possession or into receipt of the rents and profits of the mortgaged premises; it does not authorize them to sell. The only

M. R. 1917.

In re Prov. Assoc. of London and Gollogaly's Contract.

remedy asked for by the summons was for liberty to enter into possession or receipt of the rents and profits. If the mortgagees wished to get leave to exercise their power of sale, that should have been mentioned in the affidavit and asked for in the summons. Different considerations would affect the Court and the mortgagor in an application for leave to sell. A mortgagor might not object to the mortgagee going into possession of the rents and profits, but would object to a sale in the present depreciated condition of property. The procedure adopted in this case was misleading to the Court. He referred to *Foster* v. *Bernard* (1).

Smylie, for the vendors.

A mortgagee in possession can sell without leave of the Court under the Courts (Emergency Powers) Act, 1914, as this right is reserved by the words of sect. 1, sub-s. 1 (*b*), "except by way of sale by a mortgagee in possession." All a mortgagee who wishes to sell has to do under the Act is to ask the Court for leave to go into possession. This the vendors did, and obtained the ordinary order without any restrictions or conditions. The amending Act of 1916 (6–7 Geo. 5, c. 18) furthers limits the powers of mortgagees, but it does affect this case. The expression "a mortgagee in possession" in sub-s. 1 (*b*) means a mortgagee who has gone into possession, whether by leave of the Court or without requiring the leave of the Court. To limit the meaning of these words to a mortgagee who has gone into possession without getting the leave of the Court would restrict the application of this provision to a mortgagee who was in possession before the passing of the Act, for after the passing of the Act a mortgagee could not go into possession except by leave of the Court. There was no need to state in the affidavit that the mortgagees intended to exercise their power of sale. There was no appearance for the defendant, the mortgagor. *Foster* v. *Bernard* (1) is not in point. It was there held by the House of Lords that, assuming without deciding that certain shares held by a broker were a security within sect. 1, sub-s. 1 (*b*), of the Act, the broker at the time he realized the security was "a mortgagee in possession," and was, therefore, entitled to realize the security without first obtaining the leave of the Court.

(1) [1916] 2 A. C. 154.

O'CONNOR M.R.:—

In my opinion the meaning of the words "mortgagee in possession" in sect. 1, sub-sect. 1 (*b*), of the Courts (Emergency Powers) Act, 1914, is a mortgagee who has gone into possession without any leave from the Court. If it means a mortgagee who had gone into possession after he had obtained an order from the Court under sub-sect. 1 (*b*), it provides a means for deceiving the Court, because it would enable a mortgagee to procure an order merely for leave to go into possession, while his real purpose would be to realize his security by a sale; in other words, he could obtain an order authorizing him to enforce the remedy of going into possession, and having got that he could then enforce a different and more drastic remedy by sale.

The Court, on the hearing of an application by a mortgagee under sub-sect. 1 (*b*) for leave to realize his security, should be in a position to consider the special remedy the mortgagee sought to adopt; if the mortgagee wanted to go into possession merely to liquidate his debt by collecting the rents and profits, that would be one thing; but if it was present to the mind of the Court that the mortgagee desired to exercise his power of sale, then and in that case the Court might very well in the particular circumstances of the case refuse the application.

I am therefore of opinion that "mortgagee in possession" in sub-sect. 1 (*b*) means a mortgagee in possession without the leave of the Court, and accordingly I decide that Mr. Henry's objection to the title is good. I make the usual order for the return of the deposit, &c.

Solicitors for the vendors: *Molloy, Fayle, & Co.*

Solicitor for the purchaser: *J. H. Montgomery.*

W. L.

Wylie J.
1917.
March 22, 26.

IN THE MATTER OF RANDAL KINGSMILL MOORE'S RENTS.

Will—Satisfaction—Power of Appointment by Deed or Will—Appointment by Will among certain objects equally—Subsequent Appointment by Deed to one of the same objects "in full discharge" of share of Appointee—Satisfaction pro tanto.

By his will, dated in 1893, a testator, in exercise of a power by deed or will to appoint a portions charge of £10,000 among his younger children, appointed that the said sum should be paid in equal shares to all his daughters, of whom there were four. By deed, executed in 1896, on the marriage of one of his daughters, reciting the said power, and that there were six children of his marriage, he irrevocably appointed that £2,000, portion of the £10,000, should immediately belong to his said daughter, and he directed that the said sum of £2,000 should be "in full discharge" of the share of his said daughter in the £10,000. He died in 1897, leaving his four daughters him surviving.

Held, that the sum appointed by the deed of 1896 was in satisfaction pro tanto only, and accordingly that the married daughter became entitled under the will to £500 in addition to the £2,000 so appointed to her by deed.

QUESTION arising on the allocation of a sum of £10,000 charged on the lands sold in this matter.

The facts on which the question arose, as stated in the judgment of Wylie J., were as follows:—By an indenture, dated the 27th February, 1874, Stephen Moore, in exercise of a power under a previous settlement, charged the lands sold in this matter with a sum of £10,000 for portions of his younger children, to vest at such ages and times and in such shares as he should by deed or will appoint, and, in default of appointment, to vest at twenty-one or marriage in equal shares, and in the event of any child dying before vesting, his or her share was to accrue to the others in equal shares. The deed also contained a hotchpot clause.

There were seven children of the marriage—three sons and four daughters. The eldest son died in infancy. By his will, dated the 25th August, 1893, reciting his power of appointment under said deed of 1874, in the events that had happened, of a sum

of £10,000 amongst his younger children, the said Stephen Moore, in exercise of the said power, appointed that the said sum should be paid in equal shares to all his daughters, to be vested interests in them at the age of eighteen or marriage, with a like accruer clause, in the event of death before vesting, to the others. By an indenture, dated 9th March, 1896, executed on the occasion of the marriage of one of his said daughters, Anna Isabel Moore, reciting the said power and that there were six children of the marriage, the said Stephen Moore irrevocably appointed that the sum of £2000, portion of the said sum of £10,000, should immediately belong to and be vested in the said Anna Isabel Moore, and should be paid to her, her executors, administrators, and assigns immediately after the death of said Stephen Moore. And the said Stephen Moore thereby declared and appointed that the said sum of £2000 should be in full discharge of the share and proportion of the said Anna Isabel Moore of, in, and to the said sum of £10,000. The said Stephen Moore died on the 9th of July, 1897, without having revoked or altered his said will, leaving his four daughters him surviving. The sum of £2000 so appointed to the said Anna Isabel Moore was, on the occasion of her marriage with Francis Low, settled and vested in the trustees of her marriage settlement, dated the 10th March, 1896. The said Anna Isabel Low, otherwise Moore, died on the 5th October, 1914, leaving her husband, the said Francis Low, her executor. The charge of £10,000 was now being paid off; and the question was raised as to whether the said Anna Isabel Low became entitled under the will to the sum of £500 in addition to the sum of £2000 so appointed to her by the said indenture dated the 9th March, 1896.

J. H. Russell, for the daughters of Samuel Moore other than Mrs. Low:—

My clients are entitled each to one-third of the £8000 under the will. The appointment under the deed of 1898 was expressed to be "in full discharge" of the share of the appointee in the £10,000. These words debar her representatives from making any further claim: *Armstrong* v. *Lyn* (1). He also referred to *In re Ashton* (2), which was reversed on appeal (3), but on another

(1) I. R. 9 Eq. 186. (2) [1897] 2 Ch. 574. (3) [1898] 1 Ch. 142.

Wylie J. 1917. *In re* Moore's Rents.

ground. From the time of the settlement no question was ever raised by the trustees; and it is only now, twenty years after the death of the testator, that a claim is put forward by the personal representative of Mrs. Low for a share under the will. There is estoppel by conduct.

A. V. Matheson, for the personal representative of Mrs. Low:—

The sum appointed by the deed of 1896 was in satisfaction pro tanto only of the sum appointed by the will: *Pym* v. *Lockyer* (1). The intention that must be imputed to the appointor was to make an advance only and not to give a double portion. The words "in full discharge" would not have prevented the appointor from giving a larger share under another appointment by deed. In the cases where like words have been used, the contest was between the appointee under the deed and the other objects of the power claiming in default of appointment. Here the contest is between two appointments. Mrs. Low became entitled to £500 under the will.

Wylie J.:—

(Having stated the facts as above set out, his Lordship continued):—A nice question is raised upon the allocation of the £10,000 as to the rights of the four daughters. The trustees of the settlement of Anna Isabel Low claim the £2000 irrevocably appointed to her by the deed of the 9th March, 1896, and a claim is also made for an additional £500 under the will, so as to make her share of the £10,000 equal to that of her sisters. The sisters, on the other hand, claim to be entitled each to one-third of the £8000, balance of the £10,000. This they claim under the will, through which alone they have any claim. But the will, in clear but express terms, appoints that "the sum of £10,000 shall be paid in equal shares to all my daughters," which, of course, includes his daughter Anna, whether the will is read as of the date of the will or the date of the testator's death. Therefore, the claim of the sisters to more than one-fourth each of the £1,000 is inconsistent with the terms of the will, while the claim of the daughter Anna to £500, in addition to the £2000 already appointed to her,

(1) 5 Mylne & Craig, 29.

is quite consistent with those terms. However, the testator having irrevocably appointed by deed £2000 out of the £10,000, the will, though in terms applicable to the £10,000, can have no operation as regards that £2000, but, under sect. 23 of the Wills Act, it clearly does operate upon the £8000 still remaining at testator's disposal, and, according to the strict terms of the will, Anna would be entitled with her sisters to an equal one-fourth of that sum. She does not, however, make that claim, but is satisfied to give credit for the £2000 as part of her one-fourth share of the £10,000. The three sisters then, in order to sustain their claim under the will to one-third each of the £8000, are compelled to argue that the terms of the deed, appointing the £2000 to the daughter Anna, are such as to exclude her from all further claim on the portions fund, and from the words "all my daughters" in the will, so as to leave those words applicable only to his other three daughters. The argument is based entirely on the words "in full discharge" which occur in the appointment of the £2000. I was referred to several cases in which the effect of those and similar words in a deed of appointment was discussed and considered, but in all those cases the contest was between the appointee under the deed and the other objects of the power claiming the portions unappointed in default of appointment. In my opinion, those cases have no application to the present case. The appointor here has appointed the whole fund, and, having full discretionary power to appoint it amongst the objects of the power in such shares as he thought fit, what I have to do is to ascertain from the two instruments of appointment what his intention was as regards the whole fund, and give effect to it, having regard of course in a proper case to the presumption of law against double portions.

In *In re Tancred's Settlement* (1), Buckley J. (at p. 721) says:—"Where power is given to a person to dispose of property, it must in the first place be shown that all the requisite formalities have been observed, and, if they have been, the Court must then look for the intention of the person who disposes of the property. Therefore, I have to read these four deeds of appointment

(1) [1903] 1 Ch. 715.

Wylie J. 1917.

In re Moore's Rents.

and say what it was that the donee of the power intended to do." Reading then the deed and the will in this case, what did the appointor intend to do with the £10,000? It is clear, from the terms of the will alone, that he intended his four daughters to take it in equal shares. Now, is this evidence of intention affected by anything in the deed of 1896? By the deed he "irrevocably appoints that the sum of £2000, portion of the sum of £10,000, shall immediately upon the execution of these presents belong to and be vested in the said Anna Isabel Moore, and that the same shall be paid to her, her executors, administrators, and assigns immediately after his death, and he thereby declares and appoints that the said sum of £2000 shall be in full discharge of the share and proportion of the said Anna Isabel Moore of, in, and to the said sum of £10,000."

Now, what was "the share and proportion" of which this £2000 was to be in full discharge? The deed recites that there were then six children. There were, therefore, five younger children objects of the power, who were, under the deed of 1874, entitled in default of appointment to equal shares in the £10,000. Therefore "the share and proportion" of each of those five children, of whom Anna Isabel was one, at the date of the deed of appointment, was £2000, and, as I read the deed, it was "in full discharge" of that share and proportion, and of that alone, that the appointment was expressed to be. It is admitted that, notwithstanding the terms of the deed of 1896, the appointor might have subsequently appointed a further sum to his daughter Anna, and under the deed of 1874 she might, in certain events, have become entitled to further sums under the accruer clause. Could it be contended that the words "in full discharge," in the deed of 1896, would debar her from claiming such further sums? Therefore, it appears to me, reading both the will and the deed, that the intention of the appointor was to give the £10,000 to his four daughters in equal shares. If the daughter Anna had made the claim, as has been made in some cases, to one-fourth share of the £8000 under the will, in addition to her appointed share, I would have held that she was debarred from making such claim, both by the deed itself and by the presumption against double portions.

In a recent case, very like this, *In re Peel's Settlement* (1), by his will, dated in 1869, a testator who had a power under the settlement upon his first marriage to appoint certain funds in favour of his children by any marriage, appointed the same equally among all the children of his second marriage who should be living at his death. There were seven children, all of whom survived him. By two deeds, executed respectively in 1897 and 1901, he appointed a seventh share of the settled funds to each of two of these children, and he died in 1910. It was held by Joyce J. that the rule against double portions applied, and that the two children were not entitled to any further share under the will. In that case, the two children got by their deeds of appointment the full share given to them by the will, and it was, therefore, a case of complete ademption or satisfaction. Here the appointee only got part, and, therefore, there is only ademption or satisfaction pro tanto.

I, accordingly, declare that the daughter Anna became entitled under her father's will to a sum of £500 out of the sum of £10,000, in addition to the sum of £2000 advanced during the testator's lifetime.

Solicitor for the daughters of Samuel Moore other than Mrs. Low: *Gerald A. Howe.*

Solicitors for personal representative of Mrs. Low: *Stephen Gordon & Son.*

J. E. W.

(1) [1911] 2 Ch. 165.

Appeal.
1917.

Feb. 26, 27.
April 18, 19.

DAVY AND ANOTHER *v.* REDINGTON AND OTHERS (1).

(1915. No. 578.)

Will—Construction—"My Real Estate consisting of my Interest in the Lands of D"—Separate Disposition of Personalty—Beneficial Interest in charges affecting the Lands.

A testator possessed of real estate and entitled to the beneficial interest in certain charges upon a portion of his lands, made a devise of his real estate consisting of his interest in the lands of D. and K., and also disposed separately of his personal estate.

Held, that the beneficial interest in the charges did not pass under the terms of the devise.

Technical expressions used in a will must be given the meaning assigned to them by law, unless the context contains a plain indication of a contrary intention.

Mackesy v. *Mackesy*, [1896] 1 I. R. 511; *Kilkelly* v. *Powell*, [1897] 1 I. R. 457, distinguished.

APPEAL from an order made by Barton J. declaring that the testator's beneficial interest in charges upon certain lands passed under the devise of the real estate.

By his will, dated 2nd September, 1905, John Redington, who died on 22nd August, 1911, disposed of his property as follows:—"I give, devise, and bequeath to Patrick J. Davy, of Killaghbeg, Ballinasloe, Co. Galway, and Thomas M. Kenny, of Galway, solicitor, whom I hereby appoint trustees and executors of this my last will and testament, all my real leasehold and personal property of whatsoever nature and kind to stand possessed thereof upon trust to receive the dividends, income, and profits thereof, with power to continue or vary the investments, and to invest any portion of my assets which may consist of ready money, and be available for such purpose, after payment of my just debts, in such securities as trustees are by law authorized to invest and to receive the dividends, income, and proceeds, of all such property in trust for my dear wife during her life, and upon her death my trustees are to hold my real estate consisting of my interest in the lands of Dangan and Knocknacarragh, in trust to permit my

(1) Before SIR IGNATIUS J. O'BRIEN C., and RONAN and MOLONY L.JJ.

eldest son, Thomas Nicholas Redington, as tenant for life to receive the rents and profits of said lands, and upon his decease in trust for his issue in male tail, or female tail, and should the said Thomas Nicholas Redington die without such issue, and in default thereof my executors are to stand possessed of said real estate on the same terms as are expressed of and concerning my personalty. Upon the death of my said wife I direct and empower my executors out of my personal estate to pay to my sons Charles Redington, and Cecil Dudley Redington the sum of £500 each, to be received by them in full discharge of all claims and demands whatsoever that they may have under my settlement, or this my will, or as my next-of-kin, it being my intention that they should only participate in my assets to the extent mentioned. After the payment of the said sums of £500 as aforesaid my trustees are out of the residue to set apart and invest a sufficient sum or sums to secure an annuity of £80 for my eldest daughter, May Redington, during her life, or until marriage, as hereinafter provided, and an annuity of £100 for any other daughter that may be unmarried and a spinster (not a widow) at the time of my decease, and continue to pay such annuity or annuities until the date or dates of their respective marriages, and upon such marriage they are to become entitled to an equal share of my residuary estate as is hereinafter provided, but said annuities are only to spring from the death of my wife, and the residue of my personal property, on the death of my wife, and after payment of said legacies of £500 each to my two younger sons, and making provision by investment for the annuity or annuities of £80 and £100 for my unmarried daughters as aforesaid that may survive me, is to be divided amongst all my daughters, share and share alike."

The testator was, at the time of his death, entitled to an undivided third of the freehold estate in the lands of Dangan. He was also beneficially entitled to the interest in a family charge and mortgage on the lands, and he was absolute owner of the lands of Knocknacarragh. An action was brought by the executors and trustees for a declaration that the sums included in the family charge and mortgage were well charged on the lands of Dangan. The main question in the case was whether the testator's beneficial interest in the charge and mortgage passed under the

Appeal. 1917. DAVY v. REDINGTON.

devise of "my real estate consisting of my interest in the lands of Dangan," or whether it was included in the personal estate disposed of by the testator. Barton J. held that the charges passed under the devise, and from that decision this appeal was taken by the executors and trustees.

Fetherstonhaugh K.C. and *Pringle*, for the appellants:—

The testator kept his realty and personalty apart, and dealt with each separately. His "interest" in the lands of Dangan consisted of an undivided third, and that is all that passed under the devise in the first part of the will. A general devise does not pass the beneficial interest in a mortgage: Hawkins on Wills, 2nd ed., p. 49. By the separate disposition of his personal estate or personalty, the testator made it quite clear that he did not intend the charge and mortgage to pass under the devise. The case is, therefore, distinguishable from *Mackesy* v. *Mackesy* (1) and from *Kilkelly* v. *Kilkelly* (2), in which the words of devise were "all my estate and interest" without any disposition of the personal estate.

Pigot K.C., *Dickie K.C.*, and *Sainsbury*, for the respondents:—

It is manifest that the testator had under consideration (*a*) all that he possessed beneficially in connexion with the lands of Dangan and Knocknacarragh; (*b*) his personalty unconnected with these lands. The phrase, "my real estate," &c., in this will was a geographical description of what the testator possessed or was entitled to in the two localities mentioned.

Where there are in a will words analogous to the phrase "all my estate and interest," to which a definite meaning has, in law, been assigned, *Mackesy* v. *Mackesy* (1) and *Kilkelly* v. *Powell* (2) are clear authorities that under a devise of "my real estate, consisting of my interest," &c., the beneficial interest of the testator in charges on such lands passes.

Ronan L.J. refers to *Scott* v. *Best* (3) and *Franks* v. *Bollans* (4).

[A wide construction should be given to the word "interest," per Porter M.R. in *Mackesy* v. *Mackesy* (1), at page 517. The

(1) [1896] 1 I. R. 511.
(2) [1897] 1 I. R. 457.
(3) 6 L. R. Ir. 7.
(4) L. R. 3 Ch. App. 717.

words "rents and profits" were wide enough to embrace everything payable out of the lands.]

[Other authorities referred to:—*Mathews* v. *Mathews* (1); *Guyton and Rosenberg's Contract* (2); *Vallance* v. *Vallance* (3); *Bowen* v. *Barlow* (4); *Driver* v. *Broad* (5); *Johnson* v. *Webster* (6); *Latham* v. *Travers* (7); *In re Foster's Estate* (8).]

SIR IGNATIUS J. O'BRIEN C.:—

The very full and learned argument addressed to us by the respondent's counsel in support of the construction placed on the will by the Court below has failed to convince me that we ought to uphold the judgment of Mr. Justice Barton. If a will can, on the face of it, be construed without difficulty, it is not necessary to invoke any authority. No doubt, if, after careful analysis of the language of a will, the Court finds that the exact operative effect of certain words or phrases is doubtful, assistance may be derived from other cases in which the Courts have dealt with questions of ambiguity. But the general scheme of this will is, to my mind, so absolutely clear that it is free from the slightest doubt or difficulty. The testator had an interest in the lands of Dangan to the extent of an undivided third; he had also an interest in a certain family charge, together with an ordinary mortgage affecting those lands; and he was absolute owner of the lands of Knocknacarragh. In addition, he was possessed of a good deal of general personal assets. His personalty, including the family charge and the mortgage on the lands of Dangan, appears to have amounted to £20,000 or £21,000. In these circumstances the testator came to make his will. In it he uses expressions such as "personal estate" and "personalty," which, in the absence of words indicating a contrary intention, must be given the meaning assigned to them by law. The testator clearly distinguishes his personalty from his real estate. His will, in the first place, devises and bequeaths to the trustees "all my real, leasehold, and personal property of whatsoever nature and kind to stand possessed thereof upon trust to receive the dividends, income, and profits thereof," for his wife

(1) L. R. 4 Eq. 278.
(2) [1901] 2 Ch. 591.
(3) 2 New. R. 229.
(4) L. R. 8 Ch. 171.
(5) [1893] 1 Q. B. 744.
(6) 4 De G., M'N. & G. 474.
(7) [1912] 1 I. R. 140, 306.
(8) [1912] 1 I. R. 425.

Appeal. 1917.

DAVY v. REDINGTON.

Sir Ignatius J. O'Brien C.

during her life. So far there is no doubt or ambiguity as to the disposition of his property.

It is also clear that on the death of his wife the testator intended his real estate and his personal estate to go in different directions. Upon the death of his wife the real estate went to his son as tenant in tail, or, as has been suggested, the eldest son was given a tenancy for life, with remainder to his issue as purchasers. It seems to me, however, fairly clear that, having regard to the rule in *Shelley's Case* (1), the eldest son took a tenancy in tail; but it is not essential to determine that question. He contemplated that that estate tail might determine, and in that event he directed that his trustees were to stand possessed of the real estate "on the same terms as are expressed of and concerning my personalty." We have got to see what was the property he intended to include in each of the two categories mentioned—real estate and personal estate. Upon the death of his wife he directed his trustees to pay out of personal estate to his sons, Charles Redington and Cecil Dudley Redington, the sum of £500 each. Apart from the words which are supposed to create a difficulty in the construction of this will, it is perfectly plain that the testator must have intended these two sums to be a charge upon all his personal property, including the family charge and mortgage; there is nothing to indicate the contrary view, and if proceedings were taken to have them raised out of that property, there could be no answer to the claim.

I come now to the words supposed to create the difficulty. The testator directs that upon the death of his wife his trustees are to hold "my real estate, consisting of my interest in the lands of Dangan and Knocknacarragh, in trust, to permit my eldest son, Thomas Nicholas Redington, as tenant for life, to receive the rents and profits of said lands." It was contended—and Mr. Justice Barton yielded to the contention—that, on the authority of two cases to which I shall refer, the effect of the words "consisting of my interest" was that the beneficial interest in the family charge and mortgage passed to Thomas N. Redington under the devise to him of the rents and profits of the lands. Assuming that the words "consisting of my interest" might, if standing

(1) 1 Co. 93 *b*.

alone, introduce an element of doubt, all doubt seems to me to vanish when we read them in connexion with the provision in the will by which the testator directs that, after the death of his wife, his executors are to pay "out of my personal estate" the two sums of £500 to his other sons. Why, when the testator deliberately uses a technical word embracing in the absence of a contrary intention all his personal estate, should we hold that he did not mean what he says?

Two cases decided by the Court of Appeal in this country have been cited in support of the respondents' case: *Mackesy* v. *Mackesy* (1) and *Kilkelly* v. *Powell* (2).

In *Mackesy's Case* (1) the words were:—"All that and those my estate and interest in the lands of A." The Master of the Rolls held that under these words the testator's beneficial interest in a mortgage on the estate passed under the specific devise of the lands; but while this decision was right, it seems to me that it is not an authority for holding that in the present case the family charge and mortgage passed under the devise of the real estate "consisting of my interest" in the lands of Dangan. I do not lay down the principle that in some cases the words "all my estate" or "all that and those my estate" might not be sufficient to carry not only all the lands, but an interest in the lands such as a mortgage. Each will must depend upon its own particular terms; and where these are clear and unambiguous, it is unnecessary to invoke the aid of any rule of construction. The will in *Mackesy's Case* (1) contained the important word "all"; and, in addition, the entire will was, on the face of it, consistent with the intention to give not only the lands, but also the charge on them. Moreover, the mortgage in that case was itself part of the settled property.

In *Kilkelly* v. *Powell* (2) the words were "all my estate and interest." FitzGibbon L.J., in his judgment, said:—"It is a very slight paraphrase of 'all my estate and interest' to say 'every estate and interest which I have'; and when it is shown that the testatrix had several estates and interests, it rests upon those who contend that one only passed to show that she intended only one to pass." Lord Ashbourne at

(1) [1896] 1 I. R. 511.

(2) [1897] 1 I. R. 457.

Appeal. 1917.

DAVY v. REDINGTON.

Sir Ignatius J. O'Brien C.

page 460 says :—" It is all a question of construction, from which we are to deduce the intention. Did she intend to carve out of the property she had in these lands such an immense proportion of it as these charges would amount to ? Did she intend to make an exception of such a substantial part when she gave 'all her estate and interest' in the lands to the devisee, when he might thus have been sold out the next day at the suit of the executors ? I am of opinion that she meant to give no such restricted estate or interest, but that she meant to give everything she could give."

There is no magic, I think, in the words "all my estate"; but in *Kilkelly* v. *Powell* (1) these words, taken in conjunction with the other terms of the will, showed that there could be no other reasonable construction. While great weight ought to be given to the views of the eminent judges who decided the two cases to which I have referred, it must be borne in mind that there is a great dissimilarity between the material words in this case and the words in *Mackesy* v. *Mackesy* (2) and *Kilkelly* v. *Powell* (1). In these two cases there is an entire absence of any distinction between real and personal property, such as the testator has made in the present case.

It is in the circumstances impossible to give the words "consisting of my interest" the same meaning as was given to "all my estate and interest" in the two cases I have discussed.

The testator, a land agent, knew that he was possessed of real estate and personal estate, and he dealt with each separately. As the clause relating to the personal estate is, as I have already said, quite clear, the will could not be construed as the respondents suggest without making ambiguous a clause that is unambiguous. Such a result must be avoided; ambiguities must not be introduced into wills where they do not exist, and where the words themselves bear a reasonable construction free from doubt that construction should be adopted.

RONAN L.J. :—

In this case I agree with the result arrived at by the Lord Chancellor, and with his reasons for arriving at that result.

As to *Kilkelly* v. *Powell* (1) I may add that in that case Lord

(1) [1897] 1 I. R. 457. (2) [1896] 1 I. R. 511.

Ashbourne relied strongly on the fact that the testatrix intended no benefit to anyone but the person to whom she gave her lands, except that she authorized her solicitor to have his costs.

It is a settled rule of construction (see Hawkins on Wills, 2nd ed., p. 5) that "technical words and expressions must be taken in their technical sense unless a clear intention can be collected to use them in another sense, and that other can be ascertained." In support of this proposition he cites from the judgment of Lord Wensleydale (then Parke J.) in *Doe d. Winter* v. *Perratt* (1) the following passage:—"It is a rule in the judicial exposition of wills, that technical words, or words of known legal import, are to be considered as having been used in their technical sense, or according to their strict acceptation, unless the context contain a plain indication to the contrary." In this will technical expressions which have a plain and well-recognized meaning are used; they are "real estate" and "personal estate" or "personalty." These technical expressions must be taken in their technical sense if there are not in this will any other words indicating a clear intention that they are not to be so taken.

In addition to what the Lord Chancellor says, it seems to me that the direction that, in the event of the death without issue of Thomas N. Redington, the trustees were to hold the real estate "on the same terms as are expressed of and concerning my personalty," shows that the basis of the will was—1, that during the life of the testator's wife real and personal should go together; 2, that they should then go to different persons; 3, that in the event just mentioned they should again go to the same persons. The distinction between real and personal estate is at the root of the will. The sole ground suggested for holding that the words "real" and "personal" are not to be taken in their proper meanings is the expression "my real estate consisting of my interests in the lands." The decision below simply strikes the vital words, "my real estate," out of the very clause relied on, and leaves it simply, "my interest in the lands." Even as to the strict meaning of this, Sir W. Page Wood L.J., in *Franks* v. *Bollans* (2), says:—"The argument for the appellants involves the manifest fallacy of confounding an interest in land with a mere charge on land."

(1) 6 M. & G. 342.

(2) L. R. 3 Ch., at p. 718.

Appeal.
1917.
DAVY
v.
REDINGTON.
Ronan L.J.

In the next place the decision involves reading "my personal estate" as "the residue of my personal estate after deducting the charges," though further on in the will when he means the residue of the personal estate he expressly says so. In these circumstances I think the technical terms "real" and "personal" must be taken in their proper sense, that the testator intended his real estate for his eldest son, and his personal estate for the other purposes of his will. The construction we adopt gives a rational and legal meaning to every word in the will. The opposite view requires the words "real and personal" to be read out of their proper meaning solely in consequence of one clause, and construes the *effect* of that clause as if the leading words "real estate" were omitted. Cases such as *Mackesy* v. *Mackesy* (1) and *Kilkelly* v. *Powell* (2), where there are no technical terms and no discrimination between or even mention of real and personal estate, have no application.

MOLONY L.J. :—

Mr. Justice Barton was of opinion that the construction of this will was governed by the same considerations as prevailed in *Mackesy* v. *Mackesy* (1) and *Kilkelly* v. *Powell* (2). An examination of these cases shows that they are not authorities in favour of the construction adopted by the learned judge. It may be taken as settled that the words "all my estate and interest" in certain lands are sufficient to carry not only the testator's interest in the lands, but also the beneficial interest he had in charges on the lands unless a contrary intention appear by the will. In the present case, however, the words used are not "all my estate and interest," but "my real estate consisting of my interest in the lands of Dangan and Knocknacarragh," which mean a very different thing, as is shown by the context of the will.

Many cases have been referred to, but, on reading the will itself, I am unable to see any ambiguity, and I do not think the cases cited are of any real assistance; and in this connexion we should never lose sight of the very wise observation made by Lindley L.J. in *Jeffray* v. *Tredwell* (3), where he was pressed with authorities in a case where the will seemed to him to be unambiguous. He says (at p. 653) :—"There is no ambiguity in

(1) [1896] 1 I. R. 511. (2) [1897] 1 I. R. 457. (3) [1891] 2 Ch. 640.

the will at all. There is no expression which gives rise to any doubt or difficulty. But we are asked to look out of the will into authorities, and I protest having recourse to authorities for the purpose of raising a difficulty. I understand having recourse to authorities for the purpose of grappling with a difficulty when it arises, but it appears to me a misuse of cases on construction to depart from a plain instrument, and to find from authorities something which you do not find in the instrument itself, and which you import from the authorities into the instrument, and thereby raise a doubt, and then have recourse to the same authorities for the purpose of seeing how the doubt is to be met. It appears to me that is fundamentally erroneous, and I think our duty is, upon a plain will, to adopt the construction which the words require."

Now, in this will, what is the construction which the words require? Here the testator was possessed of both real and personal property, and he specifically deals with each in his will in clear and unambiguous terms. He first gives a life interest to his wife in all his property—real, leasehold, and personal property—and then, after her death, he proceeds to divide his estate between his three sons and seven daughters. He says his trustees are to hold "my real estate, consisting of my interest in the lands, of Dangan and Knocknacarragh in trust to permit my eldest son, Thomas Nicholas Redington, as tenant for life, to receive the rents and profits of said lands." His real estate did consist of one-third of Dangan, the whole of Knocknacarragh, and the rents and profits were derived from these lands. But it is contended that these words are sufficient to carry, in addition, certain charges on the lands of Dangan, to which testator was beneficially entitled. To give this construction would, in the first instance, be to give to the words a meaning which they do not ordinarily bear; and would, in addition, be to contradict the very next sentence in the will, in which the testator clearly shows that the whole of his personal estate was applicable to the payment of the two legacies of £500 to the younger sons, and the annuities to the daughters.

Solicitors for the appellants: *E. & G. Stapleton.*

Solicitors for the defendants: *Sainsbury & Co.*

C. L.

Wylie J.
1917.
Mar. 19, 24.

IN THE MATTER OF THE ESTATE OF WILLIAM MORRIS COLLES.

Settlement—Construction—Equitable Interests in Realty—No Words of Limitation—Trust to convey—Period of Distribution.

By a marriage settlement real property was conveyed to a trustee upon trust, after the solemnization of the marriage, to permit the wife to receive the rents for her life, then to permit the husband to receive the rents for his life, should he survive, then upon trust to convey the property to the children of the marriage, subject to appointment, and in default of appointment to the children of the marriage, if more than one, share and share alike, and if only one, then to such only child, and upon further trust, after the death of the survivor of the husband and wife, in case there should not be any issue of the marriage, to convey the property to S. and G., sisters of the wife, their and each of their heirs, executors, administrators, and assigns, and if either of them should die leaving issue then upon trust to convey the share of her so dying to her issue, if more than one, share and share alike, and upon trust after the decease of the survivor of the wife, husband, S., and G., without issue of any of them, to convey the property unto the children of the late H. B., if more than one, share and share alike, and if only one such child, the whole to such only child. There was no issue of the marriage. S. and G. died unmarried. Both they and the husband died in the lifetime of the wife. She subsequently died. There were ten children of H. B. living at the date of the settlement, eight of whom survived the wife.

Held, that, under the trusts of the deed, the trustee was only bound to convey once, viz., on the death of the survivor of the two tenants for life, and, accordingly, that the children of H. B. who were alive at the time of the death of the wife were entitled to call for a conveyance.

O'Mahony v. *Burdett* (L. R. 7 H. L. 388) considered.

QUESTIONS of law submitted by the Examiner arising on the construction of a settlement produced in the course of an inquiry directed by the Court for the purpose of ascertaining who was now entitled to one-third of the redemption price of certain head rents which had been redeemed in this matter.

The facts were as follows :—

By a settlement, dated the 15th October, 1863, and made by Eliza Abbott on the occasion of her marriage with Edward G. Daley, reciting that Eliza Abbott was in her own right seised of

or entitled to one-third part or share of certain lands, and also of certain personal property therein mentioned, and in consideration of the said intended marriage, the said Eliza Abbott did thereby grant and assign unto and to the use of Sarah Eliza Abbott and to her heirs, executors, administrators, and assigns, all the said one-third share of said lands and all said personal estate to hold unto and to the use of the said Sarah Eliza Abbott, her heirs, executors, administrators, and assigns, but upon trust for the several intents and purposes thereinafter mentioned, that is to say, upon trust for the said Eliza Abbott until the solemnization of the said intended marriage, and, after the solemnization thereof, upon trust to receive and pay to the said Eliza Abbott, or permit her to receive, the rents, issues, and profits of said one-third share of said lands, and the annual income of said personal property, during the term of her natural life, and from and after her decease upon the further trust to receive and pay to the said Edward G. Daley, or permit him to receive, the said rents and profits, and the annual income of said personal property, during his life, in case he should survive the said Eliza Abbott, and from and after the decease of the survivor of the said Eliza Abbott and Edward G. Daley upon trust to convey and assign all the lands and premises and property thereby conveyed, assigned, and assured unto the children of the said intended marriage in such shares and proportions as the said Eliza Abbott should by deed or will limit or appoint, and in default of appointment, to the children of said intended marriage, if more than one, share and share alike, and, if only one, then to such only child, and upon further trust, after the death of the survivor of them the said Eliza Abbott and Edward G. Daley, in case there should not be any issue of said intended marriage, to convey and assign the said lands and premises, and property thereby conveyed and assigned, unto the said Sarah Eliza Abbott and Grace Abbott, sisters of said Eliza Abbott, their and each of their heirs, executors, administrators, and assigns, and if either of them the said Sarah Eliza Abbott and Grace Abbott should die leaving issue, then upon trust to convey and assign the share of her so dying to her issue, if more than one, share and share alike, and upon trust, after the decease of the survivor of them the said Eliza Abbott,

Wylie J. 1917. *In re* COLLES'S ESTATE.

Edward G. Daley, Sarah Eliza Abbott, and Grace Abbott, without issue of any of them, to convey, assign, and assure the said lands and premises, and property thereby conveyed, assigned, and assured, unto the children of the late Henry Bailey, if more than one, share and share alike, and if only one such child, the whole to such only child.

The events that had happened were these. There was no issue of the marriage of Eliza Abbott with Edward G. Daley. Sarah Eliza Abbott and Grace Abbott both died unmarried, and they and Edward G. Daley all died in the lifetime of Eliza Daley, otherwise Abbott. The residuary real estate of Sarah Eliza Abbott and Grace Abbott passed to Eliza Daley, otherwise Abbott, and George Daley. Eliza Daley, otherwise Abbott, died on the 5th May, 1903, having by her will devised all her real estate to Eleanor Galloway Maddock.

There were ten children of Henry Bailey living at the date of the settlement, eight of whom survived Eliza Daley, otherwise Abbott.

The following questions were submitted:—

1. Did Sarah Eliza Abbott and Grace Abbott take any, and (if so) what, estate in the lands the subject of the settlement?

2. Are the trusts, or any of them, and (if so) which, by said settlement declared, after the trust to convey and assign the property "unto the said Sarah Eliza Abbott and Grace Abbott, their and each of their heirs, executors, administrators, and assigns," valid and operative?

3. Is the trust by the settlement declared in favour of the children of the late Henry Bailey sufficient to vest in them (*a*) equitable fee-simple estates, or (*b*) life estates, and (if so) (*c*) at what period is the class to be ascertained?

The representative of one of the children of Henry Bailey who predeceased Eliza Daley, otherwise Abbott, was appointed to represent the class.

J. E. Walsh, for six of the children of Henry Bailey, who survived Mrs. Daley:—

The interests created by the settlement are equitable. It was clearly intended that the sisters of Mrs. Daley should not take

an absolute interest in the settled realty. As a matter of construction, they would each take either a life estate in a moiety: *In re Hammersley* (1), or an estate tail: *Bamfield* v. *Popham* (2). Although there are no words of limitation, there is ample evidence of intention that the children of the marriage were, in default of appointment, to take an equitable fee-simple interest: *In re Davis' Estate* (3); *Rodgers* v. *Houston* (4). The fact that personal property, which the children would take absolutely, was also settled affords additional evidence of intention: *Ex parte Rice* (5). The words limiting the interest to the children of Henry Bailey are identical with those used in the case of the children of the marriage, and the same intention must be attributed to the settlor in the one case as in the other. The form of settlement is a trust to convey. On the death of Mrs. Daley the trustee was bound to convey to the children of Henry Bailey. That means all the estate which the trustee has: *In re Oliver's Settlement* (6), per Farwell J. (at p. 195). It must be an absolute conveyance when made. The class of children of Henry Bailey intended to take must be ascertained as of the date of the death of Mrs. Daley. The settlor knew there were ten children alive at the date of the settlement, and uses the expression "if only one such child, the whole to such only child."

St. L. Devitt, for the children of Henry Bailey who predeceased Mrs. Daley:—

The class of children of Henry Bailey must be ascertained as of the date of the settlement. All the children who were alive at that time took vested interests: *Fletcher* v. *Fletcher* (7), which was affirmed on appeal (8).

H. D. Conner K.C. and *J. R. Peart*, for Miss E. G. Maddock and G. Daley:—

On the death of the survivor of the husband and wife, and in default of issue of the marriage, there is a clear direction to the trustee to convey the property to the sisters of Mrs. Daley, their and each of their heirs, executors, administrators, and assigns. This can

(1) 11 Ir. Ch. R. 229.
(2) 1 P. Wms., at p. 56, note.
(3) [1912] 1 I. R. 516.
(4) [1909] 1 I. R. 379.
(5) 30 I. L. T. R. 57.
(6) [1905] 1 Ch. 191.
(7) 7 L. R. Ir. 40.
(8) 9 L. R. Ir. 301.

Wylie J. 1917.

In re Colles's Estate.

only mean, to the two sisters themselves, if alive, or, if dead, to their representatives. The addition of the words "executors, administrators" necessarily contemplates the death of the grantee: *Gee* v. *Mayor of Manchester* (1), per Lord Campbell (at p. 740). Words such as "to pay, transfer, and assign" show an intention to vest absolutely: *Bowers* v. *Bowers* (2); *Duffie* v. *Duffie* (3). Once the trustee was bound to make a conveyance out and out, it would take very strong words to divest the property. Here there is no such divesting. The first-mentioned contingency of the two sisters, or either of them, dying leaving issue, which must mean issue living at the death of the person so dying, could not have that effect. If one of them had died leaving issue, it is not suggested that the share of the other would have been affected by the limitation over. The next mentioned contingency of the death of the survivor of the husband, wife, and two sisters, without issue of any of them, would be equally ineffective. This provision could only take effect by way of shifting use; as such it would be too remote. As there is nothing to confine the words "without issue" to any particular time, they must mean failure of issue generally: *Forth* v. *Chapman* (4). The limitations over in default of issue of the marriage cannot point to a default of issue at the death of the survivor of the husband and wife, taking that as the period of distribution, because the limitations over, if so construed, do not exhaust the alternatives. It is not a case where there is a limitation over by way of two alternatives, one of which must happen, such as death either leaving or not leaving children, as in *Da Costa* v. *Keir* (5). Here the alternatives are the existence of issue of the marriage or of the two sisters, and the death of the husband, wife and two sisters without issue of any of them. The survivor of the husband and wife might have married again and had issue. Therefore the reasoning under which gifts have been held to be substitutional does not apply. The fee-simple, accordingly, remained in the two sisters under the original limitation.

(1) 17 Q. B. D. 737.
(2) L. R. 5 Ch. 244.
(3) [1903] A. C. 491.
(4) 1 P. Wms. 663.
(5) 3 Russ. 360.

E. J. Phelps, for two of the children of Henry Bailey who survived Mrs. Daley, in reply:—

"Issue" in the two clauses, "die leaving issue" and "without issue of any of them" must refer to the same period. If, in the first clause, it refers to issue living at the death of the survivor of the husband and wife, as it is submitted it does, then in the latter clause it must have the same meaning. A time certain is fixed as the period of distribution. At that time the trustee is to convey everything that is in her, viz., the entire fee. The wording of the settlement clearly limits the class of children of Henry Bailey who are to take, to those living at the period of distribution.

Cur. adv. vult.

March 24.

WYLIE J.:—

In this case, in the course of an inquiry as to the persons entitled to the one-third share of the redemption price of certain rents, the Examiner submitted for my decision certain questions of law arising on the construction of a settlement, dated the 15th October, 1863.

[His Lordship stated the facts, and continued]:—

Now the settlement declared four distinct and separate trusts after the death of the survivor of the original tenants for life, Eliza Abbott and Edward George Daley; and in dealing with all the questions raised, it is essential to bear in mind when construing the settlement that these four trusts are all executory trusts—that is, in the words of Lord Chelmsford in *Sackville West* v. *Holmesdale* (1), trusts that made the intervention of a trustee necessary to give effect to the intention expressed in them. Lord Westbury says in the same case (at p. 565), "An executory trust will be carried into effect by a Court of Equity according to the intention of the parties, as collected from the words of the agreement or direction," and, "in construing the words creating an executory trust a Court of Equity exercises a large authority in subordinating the language to the intent." In the same case (at p. 571) Lord Cairns quotes, as the general rule applicable to

(1) L. R. 4 H. L. 561.

Wylie J. 1917. *In re* COLLES'S ESTATE.

such cases, from the decree of Lord Chancellor Cowper in *The Earl of Stamford* v. *Sir John Hobart* (1), "that in matters executory, as in cases of articles or a will directing a conveyance, where the words of the articles or will are improper or informal, the Court will not direct a conveyance according to such improper or informal expressions in the articles or will, but will order the conveyance or settlement to be made in a proper and legal manner, so as may best answer the intent of the parties."

It is also important to bear in mind, in considering these four trusts and their relations one to another, that each separate trust is to be carried out by a conveyance and assignment by the trustee of all the property vested in the trustee by the settlement. It is plain, I think, from the terms of the several trusts that the only conveyance and assignment that the trustee is empowered and directed to execute is an out-and-out conveyance of the entire property vested in her by the settlement, and that, once the trustee has executed such a conveyance to any party or parties entitled to call for it under the settlement, the trusts come to an end, and all the other trusts fail. It would seem to follow from this that there can be only one time fixed by the settlement for the execution of this conveyance by the trustee.

Now let us examine the terms of these four trusts in their order. The first is the trust in favour of the children of the marriage, and by its terms the trustee is directed, from and after the decease of the survivor of the said Eliza Abbott and Edward G. Daley, to convey and assign all and singular the lands and premises and property thereby conveyed, assigned, and assured, to the children of the marriage as the settlor should appoint, and in default of appointment to such children, if more than one, share alike, and if there should be only one such child, then to such only child. Now the effect of that trust is, I think, beyond question. Having regard to the executory character of the trust, to the fact that it is created by a marriage settlement, which raises a presumption in favour of the issue of the marriage, and also to the fact that there is a limitation over of the fee, only in case there is no issue of the marriage, and that the trust is to be carried out by a conveyance of the entire property, I have no

(1) 3 Bro. Parl. Cas. 31.

doubt that any child living at the death of the survivor of the father and mother could have required the trustee to convey the fee, and thereupon all the trusts would have come to an end. Therefore if the first trust became effective, the time fixed for the execution of the conveyance by the trustee was the death of the survivor of the tenants for life.

But there was no child, and the first trust therefore failed; and the second trust declared is, that after the death of the survivor of the said Eliza Abbott and Edward G. Daley, in case there should not be any issue of the marriage, the trustee is to convey and assign the said lands and premises and property unto the said Sarah Eliza Abbott and Grace Abbott, their and each of their heirs, executors, administrators, and assigns. Now, if the declaration of trusts had stopped there, it is plain, I think, that, upon the death of the survivor of the tenants for life without children, Sarah Eliza Abbott and Grace Abbott, if then alive, and if then dead, those claiming under them, could have called upon the trustee to convey the property to them in fee. But the further trusts, I think, show that that was not the intention of the settlor, and that that trust in favour of Sarah Eliza Abbott and Grace Abbott, their and each of their heirs, executors, administrators, and assigns, was only intended to take effect in case they were alive, or one of them was alive, at the time at which the trustee was to make the conveyance, viz., the death of the survivor of the tenants for life. And, accordingly, the third trust is declared in these terms:—"and if either of them shall die leaving issue, then upon trust to convey and assign the share of her so dying to her issue, if more than one, share and share alike." In this trust I think the words "if either of them shall die leaving issue," mean shall die during the life of the survivor of the tenants for life, because, if she survived that period, she would herself be entitled to call for a conveyance of the fee under the prior trust, and there would be nothing left in the trustee to convey.

This view is confirmed by the fourth declaration of trust which immediately follows in these terms:—"and upon trust after the decease of the survivor of them, the said Eliza Abbott, Edward G. Daley, Sarah Eliza Abbott, and Grace Abbott, without issue of any of them, to convey and assign the said lands and premises

Wylie J. 1917.

In re COLLES'S ESTATE.

and property unto the children of the late Henry Bailey, if more than one, share and share alike, and if only one such child, then the whole to such only child." This fourth trust is also by its terms to be carried out by a conveyance and assignment of the entire trust property by the trustee, and this could obviously not be done unless Sarah Eliza Abbott and Grace Abbott died in the lifetime of the survivor of the tenants for life, because if they had been living at the death of such survivor, they would have been then entitled under the prior trust in their favour to get from the trustee a conveyance of the entire trust property.

Apart from this peculiarity that each of these four trusts must be carried out by a conveyance by the trustee, which can only be made once, this case is somewhat similar to the case of *Da Costa* v. *Keir* (1), referred to by Lord Cairns in *O'Mahony* v. *Burdett* (2) in these terms (at p. 397):—"There were, in this will, various circumstances pointing out the death of the widow (the tenant for life) as the period at which all the interests were to become indefeasible. In the first place, the principal of the residue was given to G. 'from and after the death of the widow, to and for her own use and benefit, to be at her own disposal'—a provision which appeared to negative any continuing defeasibility. In the next place, the gift over from G. was framed either in case she should die leaving children, or in case she should die not leaving children. And inasmuch as she must of necessity die either leaving or not leaving children, the case was the same as those where the gift over is in the event of death simpliciter"; (and at p. 395) "and in order to avoid the repugnancy of an absolute giving and an absolute taking away, the Court is forced to read the words 'in case of death,' as meaning in case of death before the interest vests."

I think these observations apply strongly to this case, and it seems to me that the meaning and effect of these several trusts may be shortly stated thus:—Upon the death of the survivor of Eliza Abbott and Edward G. Daley the trustee is to convey and assign the trust property to the children of the marriage, if any; if none, then to Sarah Eliza Abbott and Grace Abbott, if then alive, and to their heirs, executors, administrators, and assigns; if

(1) 3 Russ. 360. (2) L. R. 7 H. L. 388.

either of them is dead leaving issue, her share to her issue; if both are dead without issue, to the children of Henry Bailey as tenants in common, and if only one child, the whole to such child. The trustee is only to convey once, viz., upon the death of the survivor of the two tenants for life; and the parties to whom the conveyance is to be made are the persons who at that time would in the events that have happened be entitled under the trusts to call for it.

Therefore, in the events that have happened, the settlor, Eliza Daley, otherwise Abbott, having survived her husband and died in May, 1903, without issue, and Sarah Eliza Abbott and Grace Abbott having both died in her lifetime without issue, the fourth trust took effect, and the persons entitled to call for a conveyance of the trust property are the children of Henry Bailey.

But I am asked to say, What children? Well, prima facie, one would say all the children who were in a position to call for and take the conveyance at the time at which the trustee was bound to make it—viz., the death of Eliza Daley, otherwise Abbott, on the 5th May, 1903. Neither dead nor unborn children could fill that position. But the question must be determined according to the intention of the settlor, if that can be ascertained from the settlement. The facts are: that Henry Bailey, who was dead at the date of the settlement, had then ten children living—a fact which, I think, we may assume was known to the settlor, as they were her nephews and nieces and the objects of her bounty. In that state of facts, in the events that have happened, the trustee is directed to convey and assign the trust property "unto the children of the late Henry Bailey, if more than one, share and share alike, and if only one such child, the whole to such only child." I think the words of the limitation plainly show that the settlor intended only those children to take who were alive at the death of the survivor of the tenants for life, that being the time fixed for the conveyance or distribution of the property.

The only remaining question is, what estate these children take under this trust? In my opinion, for the reasons already given in dealing with the first trust, the settlor intended to give them the entire trust property.

Wylie J.
1917.

In re COLLES'S ESTATE.

Solicitors for the children of Henry Bailey who survived Mrs. Daley: *Read & Macnab* and *Sellors & Co.*

Solicitor for the children of Henry Bailey who predeceased Mrs. Daley: *M. J. Macnamara.*

Solicitor for Miss E. G. Maddock and G. Daley: *Richard A. Macnamara.*

J. E. W.

Wylie J.
1917.

March 20.
April 24.

IN THE MATTER OF THE ESTATE OF ANTONIO R. EDGEWORTH.

Land Purchase Acts—Redemption—Superior Interest—Quit Rent—Jurisdiction of Land Commission to fix Redemption Price without consent of Commissioners of Woods and Forests—Land Law (Ir.) Act, 1887 (50 & 51 *Vict. c.* 33), *sect.* 15, *sub-s.* 3—*Land Law (Ir.) Act*, 1896 (59 & 60 *Vict. c.* 47), *sect.* 31, *sub-ss.* 1, 3, 8—*Irish Land Act*, 1903 (3 *Ed.* 7, *c.* 37), *sect.* 64.

Section 15, sub-s. 3, of the Land Law (Ir.) Act, 1887, is impliedly repealed by sect. 31 of the Land Law (Ir.) Act, 1896, and accordingly quit rent, payable out of lands sold under the Land Purchase Acts, will be redeemed, and the redemption price fixed, without the consent of the Commissioners of Woods and Forests.

Attorney-General for Ireland v. *Proby*, [1916] 2 A. C. 468, applied.

APPLICATION by the vendor for an order that a quit rent of £4 18*s.* 1*d.*, payable out of the lands which had been sold in this matter under the Land Purchase Acts, be redeemed, and the redemption price fixed, without the consent of the Commissioners of Woods and Forests.

E. S. Murphy, for the vendor:—

Quit rent is a superior interest which comes within the provisions of sect. 31 of the Act of 1896, and the consent of the Commissioners of Woods and Forests, under sect. 15, sub-s. 3, of the Act of 1887, is no longer necessary to redemption. The point was in effect decided in *Attorney-General for Ireland* v. *Proby* (1): see judgments of Lord Sumner (p. 477) and Lord Wrenbury (p. 480), the reasoning of which is general.

(1) [1916] 2 A. C. 468.

Wylie J. 1917.

In re EDGEWORTH'S ESTATE.

Serjeant Matheson K.C. and *M. G. Longfield*, for the Commissioners of Woods and Forests:—

The subject-matter of the decision in *Attorney-General for Ireland* v. *Proby* (1) was a Crown reversion expectant on the determination of an estate tail. Superior interests of that description were brought in for the first time by the extended definition in sect. 98, sub-s. 2, of the Act of 1903. The decision does not affect quit rent, which is still subject to the provisions of sect. 15 of the Act of 1887. Quit rent does not come within the definition of "superior interest" in sect. 31, sub-s. 8, of the Act of 1896, having regard to the special provisions in sect. 15 of the Act of 1887 affecting it. Sect. 31, sub-sect. 3, of the Act of 1896 in effect preserves the restrictions as to consent contained in sect. 15, sub-s. 3, of the Act of 1887. Having regard to the provisions contained in sect. 37, sub-s. 1, of the Act of 1896, dealing with the redemption of tithe rent-charge, it is clear that the consent of the Treasury is still necessary in cases not within the sub-section. This shows that sect. 15, sub-s. 3, of the Act of 1887 is still in force—an inference which further appears from sect. 31, sub-s. 1, of the Act of 1896. It cannot be suggested that the consent required by the sub-section is still necessary in the one case and not in the other. Sect. 61 of the Act of 1903 confers a new jurisdiction on the Commissioners of Woods and Forests in respect of the apportionment of quit and Crown rents, and preserves the express words of sect. 15 of the Act of 1887. The redemption cannot be carried out without the consent of the Commissioners.

April 24.

WYLIE J.:—

In this case, the lands sold were subject to a quit rent of £4 18*s.* 1*d.*, and, notwithstanding the recent decision of the House of Lords in *Attorney-General for Ireland* v. *Proby* (1), the Commissioners of Woods claim the right to fix the redemption price of this quit rent, and insist upon twenty-five years' purchase. The vendor, objecting to this, applied for an order that the quit rent be redeemed, and the price fixed without the consent of the Commissioners of Woods. On the hearing of the motion, counsel

(1) [1916] 2 A. C. 468.

Wylie J. 1917.

In re EDGEWORTH'S ESTATE.

for the Commissioners of Woods opposed, and contended that the decision in the case referred to did not apply to Crown or quit rents, but only to a Crown reversion; and that sub-sect. 3 of sect. 15 of the Act of 1887 was still in force.

At the conclusion of the argument I intimated that my opinion was clear that *Attorney-General for Ireland* v. *Proby* (1) did apply, and that I would so decide, and I fixed the price at twenty-one years' purchase, but informed counsel that I would, if so desired, give a full and considered judgment.

The only question is, whether sub-s. 3 of sect. 15 of the Act of 1887 is still in force. I had occasion to advise upon this question at the Land Commission in 1915, long prior to *Attorney-General for Ireland* v. *Proby* (1), in connexion with the redemption price demanded by the Church department of the Land Commission for ecclesiastical tithe rent-charge, and I then gave it as my opinion, and informed them I would so decide, if the question were raised before me, that sub-s. 3 of sect. 15 was repealed.

Prior to the Act of 1896, superior interests, for the purpose of apportionment and redemption, were divided into three categories: first, Crown reversions, which were apportioned and redeemed under the powers conferred by sect. 68 of the Landed Estates Court Act, incorporated by sect. 10 of the Land Act of 1885; secondly, Crown rents, quit rents, and tithe rent-charge, which were apportioned and redeemed under the powers conferred by sect. 15 of the Act of 1887; and thirdly, annuities, rent-charges, and rents, which were apportioned and redeemed under the powers conferred by sect. 16 of the Act of 1887, and the incorporated section of the Landed Estates Court Act therein referred to.

In the case of Crown reversions the powers of apportionment and redemption were conferred subject to the consent in writing of the Commissioners of Woods. In the case of Crown rents, quit rents, and tithe rent-charge, the powers of apportionment and redemption, at a price to be fixed by the Land Commission, were conferred in absolute terms by sub-ss. 1 and 2 of sect. 15 of the Act of 1887; but then sub-s. 3 provided that no such apportionment or redemption of Crown or quit rent should be made without the

(1) [1916] 2 A. C. 468.

previous consent of the Commissioners of Woods, and no redemption of tithe rent-charge payable to the Land Commission should be made without the previous consent of the Treasury. The effect of all this was that in the first two classes of cases, if the Commissioners of Woods or the Treasury, as the case might be, did not consent to the apportionment or redemption, no order for apportionment or redemption could be made, and the lands were sold subject to such superior interests.

The third class—annuities, rent-charges, and rents—were apportioned and redeemed under sect. 16 of the Act of 1887, without any consent of the parties interested, but the price was to be fixed either by agreement or by arbitration, unless the parties consented to its being fixed by the Land Commission. The result was that, prior to the Act of 1896, the Land Commission had no power to fix the redemption price of any superior interest, unless the parties consented to its being so fixed, except, perhaps, in the case of impropriate tithe rent-charge; and this exception depended on whether this tithe rent-charge came under sect. 15 or sect. 16. But in the case of annuities, rent-charges, and rents, which were dealt with under sect. 16, not only could they be apportioned and redeemed, but the price could be fixed without any consent of the parties.

In this state of the law the Act of 1896 was passed, and the question in this case turns upon the extent to which the previous law has been altered by sect. 31 of that Act. The first great change is effected by sub-s. 1, which provides that, in all future sales, the lands shall be sold discharged of all superior interests, as defined by sub-s. 8, which undoubtedly includes all Crown rents and certain Crown reversions; and in every such case the land is to be vested accordingly in fee-simple, and such superior interests or the value thereof are to become a lien upon and to be redeemed or satisfied out of the purchase-money. Now a rent could not be redeemed without a price being fixed, and, as the law then stood, a price could not be fixed in the case of Crown rents and reversions without the consent of the Commissioners of Woods; and if such consent were refused, Crown rents and reversions could not be redeemed at all, which would be absolutely inconsistent with the last clause of sub-s. 1. Accordingly, as one would expect,

Wylie J.
1917.
In re EDGEWORTH'S ESTATE.

Parliament made provision to meet this difficulty, and by sub-s. 5 enacted that "the price or compensation to be paid in respect of a superior interest, or of any apportioned part thereof, shall be determined in the manner provided by the said sections for the redemption of annuities, rent-charges, and rents." This plainly applies to all superior interests, and refers by its very terms to the provisions of sect. 16, sub-s. 3, of the Act of 1887, whereby the price must be fixed by arbitration, unless the parties agree to the price or to refer it to the Land Commission.

It seems to me, therefore, that, if there were nothing else in sect. 31, it would be impossible to contend that this section did not do away with the necessity for the consent of the Commissioners of Woods or the Treasury, as the case might be, in any case within the powers conferred by sub-ss. 1 and 2 of sect. 15 of the Act of 1887, or, in other words, did not by implication repeal sub-s. 3 of sect. 15, because such powers of apportionment and redemption would still have remained in force, save as to the manner of fixing the prices.

But the Crown contends that this implication of repeal is prevented by sub-s. 3 of sect. 31, which it is said has the effect of retaining or reimposing the restrictions contained in sub-s. 3 of sect. 15 of the Act of 1887. Sub-s. 3 of sect. 31 of the Act of 1896 is in these terms:—"The powers of apportionment and redemption given to the Land Commission by sect. 10 of the Purchase of Land (Ireland) Act, 1885, and sects. 15 and 16 of the Land Law (Ireland) Act, 1887, shall extend to superior interests and be exercised in such manner as shall appear equitable, and shall not be limited to an apportionment between the land sold and the residue of the land subject to the superior interest."

Now, that sub-section by its terms merely extends existing powers to superior interests generally. It does not interfere with the powers conferred by sub-ss. 1 and 2 of sect. 15 and sub-ss. 1 and 2 of sect. 16 of the Act of 1887, which in their terms are absolute and unconditional, and its only effect, as regards the cases to which these powers applied, was to enlarge the power of apportionment, and, in my opinion, it did not affect the necessary implication arising from sub-s. 5, that the words, "at a price to

be fixed by the Land Commission," contained in sub-s. 2 of sect. 15, and sub-s. 3 of same section, were repealed.

A further argument against this repeal was based on the provisions of sect. 37, sub-s. 1, of the Act of 1896, which provides that "where the Land Commission, in pursuance of sect. 15 of the Act of 1887, orders the redemption of tithe rent-charge at a price not less than twenty times the net amount of such rent-charge . . . the consent of the Treasury shall not be required to such redemption"; and it is contended that the concluding words show that the consent of the Treasury was still necessary in other cases, and that sub-s. 3 of sect. 15 was therefore assumed to be still in force. Now, part of that contention is quite right: the consent of the Treasury was still necessary, but it was not under sub-s. 3 of sect. 15 of the Act of 1887, but under sub-s. 5 of sect. 31 of the Act of 1896, that the Land Commission could not fix the price of any superior interest at any figure without the consent of the parties, and as the price previously fixed by the Treasury for the redemption of the tithe rent-charge was twenty-two and a-half years' purchase, it is plain that the sole object and effect of sect, 37, sub-s. 1, was to empower the Land Commission to fix a price for tithe rent-charge of not less than twenty years' purchase without the consent of the Treasury.

The law stood thus until the Act of 1903 was passed. I have shown that, under sect. 31 of the Act of 1896, the price of all superior interests was to be fixed in the manner provided by sub-s. 3 of sect. 16 of the Act of 1887; and sect. 64 of the Act of 1903 provides that "notwithstanding anything in sub-s. 3 of sect. 16 of the Act of 1887, if the parties do not within the prescribed time agree upon the redemption price of a superior interest, that price shall be determined by the Judicial Commissioner or the Land Judge, as the case may be." Apart, therefore, from the decision in *Attorney-General for Ireland* v. *Proby* (1), I would be of opinion, and would so decide, that in the case of all superior interests, if the parties do not agree as to the price, it must be fixed by the Court without the consent of anyone, and, in my opinion, the decision in that case puts the matter beyond all doubt.

(1) [1916] 2 A. C. 468.

Wylie J.
1917.

In re EDGEWORTH'S ESTATE.

The subject-matter of *Attorney-General for Ireland* v. *Proby* (1) was a Crown reversion, and it was suggested that there was some distinction in this matter between a Crown reversion and a Crown rent, but they were both, prior to the Act of 1896, subject to the same restriction as to consent, and all the judgments in that case treat all Crown interests as being on the same footing. Lord Parker (at p. 474), having referred to the provisions of the earlier Acts, in dealing with sub-s. 1 and sub-s. 8 of sect. 31 of the Act of 1896, says:—"My Lords, it cannot be disputed that, having regard to the definition of superior interests contained in sub-s. 8, the provisions of sub-s. 1 bind the Crown, and, without any consent on the part of the Crown, operate, so far as the land sold is concerned, to extinguish all superior interests within the definition to which the Crown may be entitled, giving the Crown in lieu thereof a lien on the purchase-money. But for sub-s. 3 it would be equally clear that no consent on the part of the Crown would be necessary to the subsequent redemption or satisfaction of the Crown's superior interest out of the purchase-money. But sub-s. 3 creates considerable difficulty. It is thereby provided that the powers of apportionment and redemption given to the Land Commission by sect. 10 of the Act of 1885 and sects. 15 and 16 of the Act of 1887 shall extend to superior interests, and it is accordingly argued that, as these sections do not provide for apportionment or redemption of Crown interests otherwise than with the consent of His Majesty's Commissioners of Woods, Forests, and Land Revenues, such consent is in every case still necessary. In other words, if the Crown is entitled to a rent payable out of an estate a small portion whereof is sold under the Acts, the Crown can, by refusing its consent to either apportionment or redemption, prevent for an indefinite period any distribution of the purchase-money. It is, in my opinion, almost impossible to suppose that this was the intention of the Legislature." And having referred to other sections, he decided accordingly. Lord Sumner (at p. 477) referred to the material sections of the several Acts, and said:—"My Lords, in effect the above-mentioned sub-s. 1 now contains the consent of the

(1) [1916] 2 A. C. 468.

Sovereign given in advance, and applicable to every case as it arises, in which it becomes necessary to redeem a Crown reversion in order that the directions of sub-s. 1 may be complied with, namely, to discharge the land and extinguish the burdens, and complete the transaction by distributing the purchase-money. . . . The prohibition against apportioning or redeeming Crown rents or quit rents without the consent of the Commissioners of Woods and Forests, which sub-s. 3 of the former section contained, cannot now stand against or control the statutory direction, enacted in 1896, to deal with a Crown reversion in the prescribed way, to which the Crown by statute consents." And Lord Wrenbury (at p. 480) says:—"In these provisions it seems to me to be assumed that the veto of the Crown is gone; that the superior interest is to be discharged under sub-s. 1, and that sub-s. 3 is not intended to do more than introduce by reference sub-ss. 1 and 2 of sect. 15 of the Act of 1887, . . . and dropping the restrictive provision of sub-s. 3 of sect. 15 of the Act of 1887." I think it is plainly impossible to argue that these judgments do not cover all Crown or quit rents.

Solicitors for the vendor: *H. & W. Stanley.*

Solicitor for the Commissioners of Woods and Forests: *Sir William Fry.*

J. E. W.

Barton J.
1916.
Nov. 1, 13.

Appeal.
1917.
May 4, 15.

M'MORREN, Deceased.
WALKER *v.* M'KAY.
(1916. No. 462.)

Will — Construction — Charge of Debts and Legacies on specific fund of personalty — Primary liability of residuary personalty for payment of debts.

A testator directed his executor to sell his farm, and out of the proceeds to pay certain legacies, and his debts, funeral and testamentary expenses. The balance of the proceeds of the sale he directed to be divided equally between two charities. There was no disposition of any other property.

Held, by the Court of Appeal (1), affirming Barton J., that there were no sufficient grounds for exempting the undisposed of personalty from its primary liability for debts, and that the debts, funeral and testamentary expenses were primarily payable thereout.

Newbegin v. *Bell* (23 Beav. 386) followed.

Originating Summons.

John M'Morren made his last will, dated the 8th November, 1909, and died on the 29th March, 1915. The testator by his will appointed the plaintiff, James Walker, his executor, and proceeded as follows:—"I bequeath to him my farm in Corradown, containing about 26 Irish acres, in trust for him to sell same either publicly or privately as may seem best to him, and out of the proceeds to pay the following bequests:—First, I direct my lawful debts to be paid, as also my funeral and testamentary expenses. I bequeath . . . [here followed several legacies] . . . and I direct that any balance which may remain be divided equally between the Sustentation Fund of the Presbyterian Church in Ireland and the Orphan Society of the Presbyterian Church in Ireland." The farm was sold in November, 1911, in the testator's lifetime. On 1st July, 1912, the testator made a codicil, by which, after certain bequests, he confirmed his will. The proceeds of the farm at testator's death amounted to £464. The testator also left an undisposed-of residue amounting to about £176. His debts and funeral and testamentary expenses amounted to about £80.

(1) Before Sir I. J. O'Brien C., and Ronan and Molony L.JJ.

Barton J.
1916.

WALKER
v.
M'KAY.

The plaintiff brought the present summons for the determination of the following, among other, questions arising in the administration:—(1) Were the legacies mentioned in the will or any of them adeemed by reason of the sale by the deceased of the farm? To this question Mr. Justice Barton answered, "No." And (2) Were the debts and the funeral and testamentary expenses payable out of the proceeds of the sale or out of the general undisposed-of residue?

John Bartley, for the executor.

H. R. Poole, for the next-of-kin.

T. Henry Maxwell, for the Commissioners of Charitable Donations and Bequests.

The arguments were similar to those in the Court of Appeal, reported infra, p. 280.

Cur. adv. vult.

Nov. 13.

BARTON J.:—

The testator by his will appointed the plaintiff sole executor, and proceeded as follows:—"I bequeath to him my farm . . . in trust for him to sell same . . . and out of the proceeds to pay the following bequests:—First, I direct my lawful debts to be paid, as also my funeral and testamentary expenses." Then follow a number of bequests, and a disposal of the balance of the proceeds of the sale of the farm. But there is no disposition of any other property save the proceeds of the sale of the farm.

There are no sufficient grounds, in my opinion, for exempting the undisposed-of personalty from its primary liability for debts. In other words, I am of opinion that the mere charging of debts on a particular fund of personalty is not enough to control the general rule that the undisposed-of personalty should be first applied to that purpose in the due course of administration. In that respect the case seems to me to be indistinguishable from *Hewett* v. *Snare* (1); *Lomax* v. *Lomax* (2); *Newbegin* v. *Bell* (3); and *Corbet* v. *Corbet* (4). Reference may also be made to the older case of *Howse* v. *Chapman* (5). In all these cases a specific

(1) 1 De G. & Sm. 333.
(2) 12 Beav. 285.
(3) 23 Beav. 386.
(4) I. R. 8 Eq. 407.
(5) 4 Ves. 542.

Barton J. 1916. WALKER v. M'KAY.

fund consisting of personal estate was, as here, charged with debts, and the residue was undisposed of; and it was held by the eminent judges who decided those cases that the undisposed-of residue was not exonerated. I need not refer to cases where the residue was disposed of, or where the specific property charged was, or included, real estate, or to cases of lapse, such as *Kilford* v. *Blaney* (1), or to cases where the question arose in reference to legacies, not debts, as in *In re Grainger* (2). It is unnecessary to consider whether and, if so, how far those cases are distinguishable. It is enough to refer to the cases which are in their circumstances similar to the present one. In *Milnes* v. *Slater* (3) there was an express declaration that mortgages were not to be paid out of personal estate; and the decision was limited to mortgage debts. I have not left out of sight the passages which have been quoted from Jarman and Theobald. They do not, in my opinion, impair the authority of the cases to which I have referred. (See Halsbury, Laws of England, vol. xiv, p. 286.)

In my opinion the debts and the funeral and testamentary expenses are payable out of the undisposed-of residue.

D. M. S.

1917. May 4.

The next-of-kin appealed to the Court of Appeal.

H. R. Poole, for the appellants:—

The testator charges the debts, funeral and testamentary expenses, on the proceeds of the sale of the farm in ease of the residue. Theobald on Wills, in earlier editions (see 5th edition, p. 721), laid it down that "if a specific fund of personalty is charged with payment of debts and legacies, that is sufficient to make it primarily liable if the residue is effectually disposed of, but if no disposition of residue is attempted, the residue is primarily liable." In later editions (see 7th edition, p. 828), Theobald inclines to the view that cases such as *Hewett* v. *Snare* (4), where the residue, of which no disposition was attempted, had been held primarily liable, possibly depended on the construction

(1) 31 Ch. D. 56.
(2) [1900] 2 Ch. 256.
(3) 8 Ves. 295.
(4) 1 De G. & Sm. 333.

of the particular will. *In re Grainger* (1) decided that the legacies were payable out of the particular fund, and that the general residue was free. *Holford* v. *Wood* (2) is overruled by *Browne* v. *Groombridge* (3) and *Choat* v. *Yeats* (4). I rely on *Milnes* v. *Slater* (5) and *Dacre* v. *Patrickson* (6). *Newbegin* v. *Bell* (7) is the only case in which personal estate bequeathed in trust to pay debts was held to be secondarily liable. That decision is wrong, and should be overruled.

T. Henry Maxwell, for the Commissioners of Charitable Donations and Bequests:—

The residuary personalty is primarily liable for the payment of the debts, and it can only be exonerated either expressly or by necessary inference. Here the testator was not thinking of the residue or of exonerating it. He gave certain charitable legacies, but does not mention his next-of-kin in his will. Therefore, it cannot be said that he had any intention to onerate the particular fund in relief of the residue. Only a necessary inference can discharge the ordinary fund: *Holford* v. *Wood* (2); *Howse* v. *Chapman* (8). In *Milnes* v. *Slater* (5) the will onerated the particular fund, and expressly dealt with the residue, which for that reason was held to be exonerated. *Newbegin* v. *Bell* (7) is an express authority in the respondents' favour; and even if wrongly decided, ought not now to be disturbed. He also referred to *In re Smith, Smith* v. *Smith* (9), *Kilford* v. *Blaney* (10), and *Trott* v. *Buchanan* (11).

Cur. adv. vult.

May 15.

SIR IGNATIUS J. O'BRIEN C.:—

In this case the testator has by his will, in effect, appropriated a specific part of his estate for the payment of his debts, but he has made no disposition of his general residuary personal estate. A question was raised as to whether the words of the will, strictly construed, did amount to such an appropriation; but it was

(1) [1900] 2 Ch. 756.
(2) 4 Ves. 75.
(3) 4 Madd. 495.
(4) 1 J. & W. 102.
(5) 8 Ves. 295.
(6) 1 Dr. & Sm. 186.
(7) 23 Beav. 386.
(8) 4 Ves. 542.
(9) [1913] 2 Ch. 216.
(10) 31 Ch. D. 56.
(11) 28 Ch. D. 446, 453.

Appeal. 1917.

WALKER v. M'KAY.

Sir Ignatius J. O'Brien C.

ultimately admitted on both sides that, properly considered, they did create at least a charge of debts on this specific property.

Mr. Justice Barton held that in the absence of any residuary bequest he was compelled by authority to decide that the undisposed-of personalty formed the primary fund for payment of the debts. If one were at liberty to consider a case of this kind apart from authority, it would, to some minds at any rate, appear rather singular that where a testator has in unambiguous words charged a specific portion of his personal estate with the payment of his debts, his intention may be frustrated unless he proceeds either by express words or by terms involving certain implication not only to onerate the particular fund but to exonerate the general personal estate. But, whether one is pleased or displeased with the law as laid down by the Judges in other cases, one must accept it if it is clear. It was admitted by Mr. Poole that if the case of *Newbegin* v. *Bell* (1) is good law he has no case, because it is a perfectly clear authority that even though there be a charge of debts upon specifically bequeathed chattels, yet in the absence of a residuary gift the debts are payable primarily out of the residue. He asks us to overrule that case, or at any rate to overrule it in so far as it included within its principle a state of facts where specific property is bequeathed on trust to sell and apply the proceeds in payment of debts as distinguished from property bequeathed subject to a mere charge of debts.

Newbegin v. *Bell* (1) was decided by Sir John Romilly M.R. in 1857. It was followed in this country in 1874 by Sir Edward Sullivan in a very carefully considered judgment in *Corbet* v. *Corbet* (2). No doubt there appears to be some slight discrepancy in our text-books with regard to the effect of *Newbegin* v. *Bell* (1) and other cases which seem to be decisions to the same effect. Although very much inclined, if I could, to take a different view from that which is so tersely expressed in *Newbegin* v. *Bell* (1), I conceive that I am not at liberty to do so. In Williams on Real Assets there is a passage at page 99 purporting to be a summary of the authorities; and it reads thus:—

"If the testator has appropriated any specific part of his personal estate for the payment of his debts, and has also disposed

(1) 23 Beav. 386.

(2) I. R. 8 Eq. 407.

of his general residuary personal estate, the part so appropriated will be primarily liable to the payment of the debts. If, however, he has made no disposition of his general residuary personal estate, then, notwithstanding such an appropriation, the general residuary personal estate thus remaining undisposed of, will still remain subject to its primary liability to pay the debts." For these propositions four cases are cited: namely, *Howse* v. *Chapman* (1), *Hewett* v. *Snare* (2), *Lomax* v. *Lomax* (3), and *Newbegin* v. *Bell* (4). It seems to me that the passage in Williams is an accurate summary of what was decided in those cases. Sir Edward Sullivan points out in *Corbet* v. *Corbet* (5) that Lord St. Leonards in *Phillips* v. *Eastwood* (6) must have held a similar view. The rule, however, leads to this curious result that in a case where the residue is undisposed of it may be immaterial whether the testator has charged or not charged any specific part of his estate with the payment of debts. The residuary estate will, in either case, be primarily liable; and the expressed intention of the testator is expunged from the will unless, as I have already said, he has added words to exonerate the general residuary personal estate. But it may be that when the judges found themselves confronted with the fixed rule in the administration of assets making the general personal estate primarily liable for debts, they considered that nothing short of express words of exoneration, or what might be taken to be equivalent—a specific bequest of the residue—would be sufficient to get rid of the primary liability. Be that as it may, the rule appears to me to have been consistently acted upon during so long a period of time that it would now be unwise, if not impossible, to disturb it. A passage in *Kilford* v. *Blaney* (7), in the judgment of Fry L.J., may be referred to in this connexion. The case deals with a devise of real estate charged with the payment of debts. Having enunciated the general rule that if a testator charges real estate with payment of his debts in exoneration of his personal estate, and bequeaths personal estate to particular individuals, he is held

(1) 4 Ves. 542.
(2) 1 De G. & Sm. 333.
(3) 12 Beav. 285.
(4) 23 Beav. 386.
(5) Ir. R. 8 Eq. 407, at p. 410.
(6) Ll. & G. 281.
(7) 31 Ch. D. 56, at p. 66.

Appeal. 1917. WALKER v. M'KAY. Sir Ignatius J. O'Brien C.

to have intended to exonerate his personal estate for the benefit only of those legatees, Fry L.J. proceeds:—

"That enunciation of the rule no doubt applies to cases where there is a conflict between real estate and personal estate; but in my view it is only a branch of the more general principle—that where the gift to the person intended to be benefited by the exoneration fails, the exoneration itself fails, the right to the benefit of the exoneration being in fact a part of the legacy which fails. That principle applies in my mind whether the property dealt with be realty or personalty, and I think that we should be wrong if we drew a distinction between them on the ground of a doubtful case in which the point appears never really to have been insisted upon."

This passage, to my mind, furnishes ground for the suggestion I have made that where there is a charge on a specific fund followed by a gift of residue, this latter may be treated as a gift exonerated from liability because of the original oneration of the particular fund; but that in the absence of a named person to take the residue, there is nothing to show that exoneration was intended in favour of the residue.

There remains the point strongly pressed by Mr. Poole that a distinction ought to be drawn between a case where property is actually devised in trust to sell and pay debts, and a case where there is a mere charge of debts. It appears to me that there can be no real difference between the two cases. If the principle is, as it seems to be, that there must be a clear indication in the will practically by express words, to exonerate the general personal estate from its primary liability to pay the debts, the exoneration can be furnished no more by words of trust than by words of charge of the special fund. The rule is essentially artificial and supposed to be based upon the ascertainment of intention. To my mind intention is as clearly ascertainable in a case where there is no trust as in a case where there is a trust; and to adopt Mr. Poole's argument would be to superadd a very artificial distinction to a very artificial rule. He pointed out that in the older cases, with the exception of *Newbegin* v. *Bell* (1), the wills contained only words of charge. I think he is in error in regard to

(1) 23 Beav. 386.

the case of *Howse* v. *Chapman* (1); and it is noteworthy that such a distinction was not suggested in *Newbegin* v. *Bell* (2).

For these reasons I am of opinion that the judgment of Mr. Justice Barton must be affirmed.

RONAN L.J.:—

I take the same view. These rules as to the administration of assets are all artificial rules, and once any one of them has been settled one way or the other I think it ought not to be disturbed. The cases cited by the Lord Chancellor, and particularly the passage in Mr. Joshua Williams on Real Assets, a book of high authority, seem to me to establish fully the conclusion at which the Lord Chancellor has arrived.

MOLONY L.J.:—

I concur fully in the judgment of the Lord Chancellor, and cannot usefully add anything to it.

Solicitor for the executor: *J. F. Dunwoody.*

Solicitor for the next-of-kin: *J. Gillespie.*

Solicitor for the Commissioners of Charitable Donations and Bequests: *J. M. Maxwell.*

C. L.

(1) 4 Ves. 542

(2) 23 Beav. 386.

Barton J.
1916.
March 30.
April 12.

Appeal.
1916.
Dec. 7.
1917.
Jan. 29.

GREALEY *v.* SAMPSON.

Will—Republication by Codicil—Date of Will brought down to date of Codicil—Substitutional Gift—Extrinsic Evidence.

A testator, by his will, gave to his son a power to appoint a jointure, not exceeding £200 per annum, charged on the lands of C., to any woman the son might marry. The son, subsequently to the date of the will, having married E., the testator, by a codicil, revoked certain devises contained in the will, and directed that E. should receive out of the lands of C. a jointure rent-charge of £200 per annum during her life.

Held, by Barton J., that parol evidence was admissible to show the testator's intention, and that, so far as E. was concerned, the jointure in the codicil was in substitution for, and not in addition to, the power of jointuring given by the will.

Held, by the Court of Appeal, that the judgment of Barton J. should be affirmed.

Held, by Sir I. J. O'Brien C., that, on the true construction of the will and codicil, the jointure given by the codicil was in substitution for that given by the will; but that extrinsic evidence as to the value of the testator's estate was not admissible, the question being one purely of construction.

Held, by Ronan and Molony L.JJ., that the codicil operated as a republication of the will; that accordingly, in the absence of contrary intention, the language of the will must be construed as of the date of the codicil, and that there was no evidence of any such contrary intention.

The principle and effect of republication of a will by a codicil of later date considered. Dicta in *Mountcashell* v. *Smyth*, [1895] 1 I. R. 346, discussed.

ORIGINATING SUMMONS.

By his will dated 8th July, 1878, the testator, George Sampson, devised the lands of Clontra (subject to a jointure in favour of his own wife of £100 a year) to trustees for the benefit of his son Charles John Sampson for life, and in case his son Charles John should marry, the testator authorized him to appoint a jointure not exceeding £200 per annum for any wife he should marry. On the 22nd October, 1880, Charles John Sampson married Ellen Mary McDermott. By a second codicil to his will dated 28th April, 1881, the testator directed that in the event of his daughter-in-law Ellen Sampson, wife of his son Charles John,

surviving his son she should receive out of the lands of Clontra a jointure rent-charge of £200 per annum during her life, but declared that the said jointure should not be paid until the £100 annuity provided for the testator's wife had been discharged.

On the 10th January, 1883, Charles John Sampson executed his last will, whereby after reciting that power had been given to him by the will of his father George Sampson to appoint a jointure not exceeding £200 for any wife he should marry, to be charged on the lands of Clontra, he appointed said jointure of £200 per annum charged as aforesaid to his wife Ellen Mary Sampson, to be payable to her from and after his decease, and declared that same should be in addition to any other benefit that Ellen Mary Sampson should take under the will of his father.

Charles John Sampson died on the 19th August, 1886, leaving his wife Ellen Mary Sampson him surviving. Ellen Mary Sampson died on the 14th September, 1915. The executors of the will of Ellen Mary Sampson brought the present summons against the trustees of the will of George Sampson, deceased, for the determination of the following among other questions:—Whether according to the true construction of the will and second codicil thereto of George Sampson the jointure rent-charge of £200 per annum bequeathed to Ellen Mary Sampson for life by the second codicil was in addition to or in substitution for a jointure not exceeding £200 per annum which Charles John Sampson had power to appoint under the will for any wife he should marry.

Oulton K.C. and *S. Hayes*, for the plaintiffs.

H. Wilson K.C. and *H. R. Poole*, for the defendants.

The arguments were similar to those in the Court of Appeal.

Cur. adv. vult.

April 12.

BARTON J.:—

By his will dated 8th July, 1878, the testator, George Sampson, devised the lands of Clontra (subject to a jointure in favour of his own wife of £100 a year) to trustees for the benefit of his son Charles John Sampson for life, and empowered him to appoint a jointure not exceeding £200 per annum for any wife with whom

Barton J. 1916. GREALEY v. SAMPSON.

he should marry, to be charged on the said lands of Clontra. Charles John Sampson, on 22nd October, 1880, married Ellen Mary McDermott. George Sampson by a second codicil gave to his daughter-in-law Ellen Mary Sampson a jointure of £200 charged on the same lands of Clontra, again taking care to give priority to the jointure in favour of his own wife of £100 a year. Charles J. Sampson afterwards purported to appoint a jointure of £200 a year to Ellen Mary Sampson under the power in his father's will. The question for decision is whether she can take both jointures.

In *Osborne* v. *The Duke of Leeds* (1), Sir R. P. Arden M.R. put an analogous question, and had no doubt as to how it should be answered. He said at p. 382:—"I will put this case, and no one can doubt upon it. Suppose a testator by a will made before his marriage gave to any woman he might afterwards marry £2000 a year by way of jointure; that afterwards he married; and then by a codicil gave his wife the same jointure, could it possibly be intended she should have two jointures?"

The force of this dictum of Sir R. P. Arden's is strengthened when we bear in mind the nature of a jointure. A wife may receive any number of annuities or rent-charges, but, in ordinary parlance, as well as according to ordinary legal notions, it is unusual to hear of a wife receiving more than one jointure. That is because a jointure is a special kind of annuity or rent-charge intended, according to its recognized definition, as a provision for the wife after her husband's death, and having from the earliest times a special relation to her right to dower. If this had been a mere disposition of two ordinary annuities or rent-charges, the intention of the testator might not be so clear as it is.

The present case differs from the case put by Sir R. P. Arden, because it is a case of a creation of a power to jointure by will, followed, after the marriage of the donee of the power, by the giving of the jointure by codicil to the donee's wife. Accordingly, the question is not whether the gifts are cumulative; but the question is an analogous one, depending upon the construction of the will and codicil taken together. In construing the will and codicil together, we are at liberty to take into account that the son

(1) 5 Ves. 368.

Charles John Sampson married in the interval between the will and the codicil. We are also, I think, at liberty, in the present case, to look at the value of the property, because the testator in both will and codicil has made the state of the property of importance by insisting upon the priority of his own wife's jointure of £100, and by providing in express terms for the possibility of the estate proving insufficient to pay both his wife's jointure and his daughter-in-law's jointure. When we look at the value of the property at the date of the will, we find that the net rental of the property was only £287 0*s.* 4*d.*, leaving less than £200 a year after payment of the testator's wife's jointure of £100 a year. The inference seems to be irresistible that the testator did not intend his daughter-in-law to take both jointures, and that the codicil, so far as Ellen Mary Simpson was concerned, impliedly revoked the gift of the power *pro tanto*. I have not rested my judgment merely on the effect of republication. *Earl of Mountcashell* v. *Smyth* (1) shows that, while a codicil brings the will down to the date of the codicil, it brings it down with all its words including its date, and that, even after republication, words of futurity and adverbs of time, occurring in the will, may be construed by reference to the date of the will, where such a construction would clearly effectuate the testator's intention. I rest my decision upon the construction of the will and codicil taken together, read in the light of the events which happened in the interval, and of parol evidence which, in my opinion, is admissible in this case.

Barton J.
1916.
GREALEY
v.
SAMPSON.

There is, in my opinion, nothing in the point that the words of the will are a jointure "not exceeding" £200, because a jointure of £200 is the complete equivalent of a jointure not exceeding £200, and exhausts the subject-matter of the power.

D. M. S.

1916.
Dec. 7.
1917.
Jan. 29.

The plaintiffs appealed to the Court of Appeal (2).

Jellett K.C., *Oulton K.C.*, and *S. Hayes*, for the appellants:—

The gift of the jointure by the codicil did not revoke the power of jointuring given by the will at least quoad the only wife the

(1) [1895] 1 I. R. 346.

(2) Before SIR IGNATIUS J. O'BRIEN, Bart., C., and RONAN and MOLONY L.JJ.

Appeal. 1916. GREALEY v. SAMPSON.

testator's son had. Since the gift in the will was a power not a bequest, he need never have exercised it. He could have given less than £200 a year. Property and power are absolutely different things, and a power cannot be substituted for property. The wife's title to each is distinct.

Any circumstance of difference between two gifts strengthens the argument in favour of cumulation: *Suisse* v. *Lowther* (1); *Hurst* v. *Beach* (2). The use of the word "jointure" in the codicil really indicated an intention on the testator's part to increase the jointure, for he knew his son had executed no settlement on this lady. Why should this jointure not be cumulative merely because it is called a jointure? There is nothing to prevent a person having two jointures. They also referred to *Russell* v. *Dickson* (3); *Wilson* v. *O'Leary* (4); *Osborne* v. *Duke of Leeds* (5): *Brennan* v. *Moran* (6); *Hodges* v. *Peacocke* (7); Smith's Equity (8).

Herbert Wilson K.C. and *H. R. Poole*, for the respondents:—

We admit that legacies given to the same person by a will and codicil are prima facie cumulative: *Osborne* v. *Duke of Leeds* (9). On the other hand, gifts given for the same motive are substitutional. But a mere description, e.g. "servant," is not a motive; and most of the cases cited in support of the plaintiffs' contention are of this kind. In this case the son was not married at the date of the will, but was married at the date of the codicil. Here the gift is substituted for the conditional power, so far as the wife is concerned: *Benyon* v. *Benyon* (10).

Extrinsic evidence as to the value of the testator's property may be admitted in the present case, because the testator has gone into it himself.

The codicil makes certain what was uncertain. The reasonable inference is, that the testator provided for the existing rights.

The codicil effected a republication of the will: *Mountcashell* v. *Smyth* (11). The proposition as to republication in *Mountcashell* v. *Smyth* (11) is too narrow.

(1) 2 Ha. 424, at p. 435.
(2) 5 Madd. 351, at p. 358.
(3) 4 H. L. Cas. 293, at p. 304.
(4) L. R. 7 Ch. 448, at p. 454.
(5) 5 Ves. 368.
(6) 6 Ir. Ch. 126.
(7) 3 Ves. Jur. 734*a*.
(8) 2nd ed., at p. 485.
(9) 5 Ves. 368, at p. 379.
(10) 17 Ves. 34.
(11) [1895] 1 I. R. 346, at p. 362.

Oulton K.C., in reply:—

Though a codicil brings down a will to the date of the codicil, it brings it down with the date of the will. The intention of the will must be gathered as of the date of the will. See per Walker C., *Mountcashell* v. *Smyth* (1), at p. 357.

SIR IGNATIUS J. O'BRIEN C.:—

In this appeal the strength of the appellants' case rests on the principle that, where a legacy is given to the same person under each of two different instruments, a will and a codicil, or two codicils, prima facie they must be treated as two gifts; but it is equally settled that this being a question of construction, the will and codicil, or the two codicils, as the case may be, must be read so as to ascertain whether the prima facie method of dealing with the two gifts really carries out the intention of the testator on the true construction of the will and codicil.

So far as the principle relied on extends it must be remembered that this is not a matter of "presumption," a matter that materially affects one of the points argued before us, namely, the possibility of admitting extrinsic evidence: it is a case of construction, pure and simple; and, to my mind, what has to be determined in this appeal is, what was the intention of the testator with regard to the two annuities—one mentioned in his will and the other in the codicil—this question depending on the true construction of the documents.

Being a question of construction, it is, I think, as well to dispose at the outset of this question of admissibility of evidence, because Mr. Justice Barton considered that the evidence tendered as to the value of the testator's assets was admissible; and, of course, if that were so, it would materially aid the conclusion at which he arrived. Having regard to the judgment of Rigby L.J. in *Dawson* v. *Higgins* (2), adopted by Lord Davey in the House of Lords (3), we must take it, I conceive, that where a will, or a will and a codicil, are to be construed together, the words in which require no special interpretation, the difficulty being only one of construction, parol evidence is not admissible.

(1) [1895] 1 I. R. 346. (2) [1900] 2 Ch. 756. (3) [1902] A. C. 1.

Appeal. 1916. GREALEY v. SAMPSON. Sir Ignatius J. O'Brien C.

If this principle with regard to the effect on legacies given by different instruments was one of the so-called presumptions, it may be that, for some limited purposes, evidence is admissible: see Hawkins on Wills, pages 14 and 358. I think, however, after very careful consideration, that the present case being one of construction the judgment of Lord Davey in *Dawson* v. *Higgins* (1) binds me to reject the evidence which was received by Mr. Justice Barton, though at first blush I should have been disposed to admit it. Accordingly, I have to approach the will and codicil with the view of ascertaining what was the intention of the testator with regard to the disposition of his property, which is the question in issue before us.

If a testator by a will simply gives a sum of money, and by a codicil gives a sum of equal amount to the same person, no motive being expressed, so long as the two documents have to be treated as separate documents for this purpose, it is not unreasonable that the construction should be in accordance with the literal words of the two documents; but, except in a plain case of that kind, a very little difference in the words in which the two legacies are given, or the connexion in which the gifts occur, will be sufficient to make the second legacy substitutional.

When the testator in this case came to make the codicil, he had two courses open to him: he might require to amend the operation of the will by reason of circumstances which rendered such amendment necessary; or he might, of course, give a perfectly new and independent gift; but, placing the two documents side by side, the rational construction of the will and codicil appears to me to be that in the will he is dealing with benefits to be bestowed on persons who, as designated beneficiaries, might or might not come into existence, while in the codicil he is bestowing a certain gift on a person not dependent upon the action of his son exercising the power of appointment. It is allowable to take into account the altered circumstances at the date of the will and at the date of the codicil, because the altered circumstances appear on the face of the document, and the natural and reasonable view to take is that the testator wished to make certain what otherwise might have been uncertain; and it seems

(1) [1900] 2 Ch. 756.

to me to be sinning against common sense to interpret the language so as to come to a different conclusion. No doubt, if the words "any wife he may marry" appeared in a will alone, they would include a wife that he had married during the testator's lifetime; but I conceive that this is a case in which I am entitled to take into account the altered state of facts between the dates of the two instruments, because, I again repeat, I conceive the testator has so indicated.

If the testator had in words said, "And whereas since the date of my will my son has married Ellen Sampson," and followed on with the gift to the wife, I can hardly conceive any doubt that the lady could not have taken the double annuity. To my mind the testator has done this. Even though the two documents may speak from the death, the codicil is essentially something tacked on to the will. In the case where two simple gifts are made, one by will and one by codicil, the presumption may be reasonable; the testator may have intended to give both. But once the case is not a simple one of presumption, the legatee contending for a cumulative construction runs the risk of defeat by any slight indication of a contrary intention.

To my mind the terms of the gifts ought to be read in this way:—"I direct that in the event of my daughter-in-law, Ellen Sampson, surviving my son, she shall receive out of the lands of Clontra a jointure of £200 per annum; and I authorize my son to appoint a jointure of £200 a year to any other woman whom he may marry in case the said Ellen Sampson does not survive him." I do not think it requires any technical juggling with words to arrive at the conclusion that to intrude the presumption into the documents so as to defeat the intention of the testator, is not obligatory when one reads the two documents rationally.

In this connexion, the cases of *Heming* v. *Clutterbuck* (1) and *Allen* v. *Callow* (2) show how comparatively small differences between the will and codicil in the case of annuities may affect the result, but each case must, no doubt, depend on its own facts, and I would wish to add that—although the contrary view was strongly urged by counsel for the appellant—the fact that the annuity in the will is one given through the ultimate

(1) 1 Bligh, N. S. 479. (2) 3 Ves. 289.

Appeal.
1916
GREALEY
v.
SAMPSON.
Sir Ignatius J. O'Brien C.

exercise of a power of appointment, while that in the codicil is given directly, does not help the appellants' view. The first was the only form in which the gift could possibly be given where the testator was not dealing with persons who were in esse, or who did not fulfil the condition at the date of the will; while the form in the codicil was the natural form, where the person had come into existence, and I am of opinion that I violate no principle of construction by looking at the dates for the purpose.

The case of *Osborne* v. *The Duke of Leeds* (1) was referred to, not as an authority, but for a passage which occurs in the judgment of the Master of the Rolls. I need not repeat it, as it is set out in full in Mr. Justice Barton's judgment. At the date of that case, 1800, the mere fact alone of a subsequent marriage did not necessarily revoke a will made before the marriage, and the Master of the Rolls had evidently in mind such a case. I do not think that the passage was, as Mr. Justice Barton considers, based on some special peculiarity of jointures. It was obviously intended as being a clear example of what occurs earlier in the judgment in reference to a person who had not come into existence at the date of the will, but who came into existence afterwards, and was mentioned nominatim in a codicil. The strength of the case for the respondents appears to me to be this: that the circumstances which appeared on the face of the documents would prevent a construction which would give an accumulation, and although the case was one before the Wills Act, the general view as to construction which the Master of the Rolls applied would seem to me to be equally applicable at the present time, and not to be prohibited by the statute.

For these reasons I think the judgment of the Court below was right.

RONAN L.J.:—

As to the admissibility of evidence of value of the property: this case is not one in which the matter turns upon the general value of the testator's estate; it is a case of a charge on a specific property. The 24th sect. of the Wills Act does not affect this. If a question arose on a will as to whether a testator had charged

(1) 5 Ves. 368, at p. 382.

£1,000 or £10,000 on a particular property, surely evidence would be admissible to show that the property was certainly not worth more than £1,500? Similarly, if the question was whether he had charged one annuity of £200 or two of such annuities, I find it hard to believe that the Court must shut its eyes to the fact that the property was not worth more than say £250 per annum. In *Bowen* v. *Lewis* (1) Lord Cairns and Lord Blackburn took the value of the property and the amount of the charge into consideration in aid of construction and to ascertain intention.

However, as I rest my judgment in this case on the principle of republication, it is unnecessary for me to come to any conclusion on this matter, or as to the effect of the case of *Dawson* v. *Higgins* (2). It appears to me that the principle of republication removes all difficulty in the present case.

Until Mr. Poole, the second counsel for the respondent, came to speak, there had been no mention of republication. There was really no argument on the point. The only case mentioned was *Mountcashell* v. *Smyth* (3), and that was not discussed in detail. The case was really treated as a mere case of will and codicil, apart from the effect of republication.

As there are certain statements in the judgments in *Mountcashell* v. *Smyth* (3), and in the judgment of Barton J. in *Long* v. *Moore* (4), which seem to me inconsistent with the earlier and later authorities, I must deal with the matter somewhat in detail. A codicil may or may not amount to a republication of a will. If the codicil does not amount to republication of the will, the will and codicil are construed according to their joint effect, construing each as of its own date. If the codicil does amount to a republication, does this make any difference? In this latter case, in order that the codicil may modify the effect of the will, it is necessary to show an intention to that effect on the codicil.

Thus, prior to the Wills Act (5), if a man had devised his real estate by his will, and then made a codicil not referring to this devise, or to the will, only the real estate at the date of the will

(1) 9 A. C., at pp. 908 and 917.
(2) [1902] A. C. 5.
(3) [1895] 1 I. R. 346.
(4) [1907] 1 I. R. 315.
(5) 1 Vict. c. 26.

Appeal. 1916. GREALEY v. SAMPSON. Ronan L.J.

would have passed. The 24th section provides that "every will shall be construed and take effect with reference to the real and personal estate comprised in it as if it had been executed immediately before the death, unless a contrary intention shall appear by the will."

It seems to me that the effect of the authorities on republication may be stated thus: With certain well-defined exceptions, when a codicil republishes a will, the effect is to bring the will down to the date of the codicil, and to make the devise in the will operate in the same way in which it would have operated if the words of the will had been contained in the codicil of later date, unless a contrary intention appears. In other words, the effect of republication is precisely similar to what would have been the effect of the section if instead of the words, "shall be construed with reference to the real and personal estate comprised in it," there were substituted the words, "shall be construed for all purposes." Indeed, in *Re Farren* (1) the Court (Monahan C.J., Ball, Keogh, and Christian JJ.) state the rule thus:—"Independent of the Wills Act altogether . . . when a will was republished by the execution of a codicil, prima facie the will operated as if it had been executed at the time of the republication, subject, however, to the exception that a contrary intention did not appear by the will itself . . . in this respect the effect of the recent Act on wills is not substantially different from the rule before the Act as to the effect of republication by a codicil on property immediately [this must mean intermediately between the will and codicil] acquired."

There never has been any limitation of the rule as to republication apart from the defined exceptions to which I have referred. These will be found in the chapters on Republication in Jarman and Williams on Executors. 1, In the absence of evidence of intention in the codicil, a legacy which has been adeemed or satisfied is not revived; and 2, in the absence of such intention a lapsed devise or bequest is not revived. These exceptions, as I shall show later, are really cases of "contrary intention." It seems to me that in the judgments in *Mountcashell* v. *Smyth* (2) and *Long* v. *Moore* (3) there are passages, at

(1) 8 I. C. L. R. 370. (2) [1895] 1 I. R. 346. (3) [1907] 1 I. R. 315.

all events, capable of meaning (*a*) that an intention that the codicil shall have the effect of republication is necessary, and (*b*) that so far as words of time are concerned the will *must* be construed as of its own date and not as of the date of republication. (*a*) and (*b*) are additional exceptions to those laid down in the books and cases. In my opinion there is no more justification for adding these limitations to the doctrine of republication than there is for adding them as provisoes to sect. 24 of the Wills Act. In the case of sect. 24 they would practically nullify its operation. So in the case of republication they would have the same effect as to construction. Some passages in the judgments in the two cases indeed seem to go this length. I shall refer to them later.

Of the earlier authorities on the subject, I take as a leading case *Goodtitle* v. *Meredith* (1), where, at p. 13, Lord Ellenborough states the rule thus:—"The effect of all these decisions is to give an operation to the codicil per se, and independently of any intention, so as to bring down the will to the date of the codicil, making the will speak as of that date, unless, indeed, a contrary intention be shown, in which case it will repel that effect." The words "per se and independently of any intention" are very important. I may add that there can be no doubt as to Lord Ellenborough's meaning, when he says, "speak as of that date," for a little further on in his judgment he says, "The codicil draws the will down to its own date in the very terms of the will, and makes it operate as if it had been then executed in those terms." That is, of course, unless a contrary intention is shown which would repel that effect. In his judgment Lord Ellenborough refers to *Acherley* v. *Vernon* (2), *Barnes* v. *Crowe* (3), and *Pigott* v. *Waller* (4). In *Barnes* v. *Crowe* (3), at p. 497 of the judgment, Lord Commissioner Eyre says:—"In *Att.-Gen.* v. *Downing* (5), Lord Camden supposed a particular intent to republish ought to appear; and that annexation or particular expressions in the codicil would demonstrate that intention. If that was necessary, not only Lord Hardwicke's opinion cannot stand, but

(1) 2 M. & S. 5.
(2) 3 Bro. P. C. 107.
(3) 1 Ves. Jun. 485.
(4) 7 Ves. 98.
(5) Ambl. 573.

Appeal. 1916. GREALEY v. SAMPSON. Ronan L.J.

neither can *Acherley* v. *Vernon* (1), for there was no particular intent to republish." The case was decided in accordance with Lord Hardwicke's opinion and *Acherley* v. *Vernon* (1).

In *Pigott* v. *Waller* (2) Sir W. Grant deals with this judgment and the cases referred to, and he adopts the rule there laid down, that it is not necessary to show any intention to republish. Lord Ellenborough's reference to these cases shows that he had this matter present to his mind when he used the words "independently of any intention."

These cases are discussed at length in Bacon's Abridgment, vol. viii, at pp. 456–463, and the result is stated at p. 463 thus:—"A codicil, properly executed, makes the will speak (as it is expressed) at the date of the codicil unless a contrary intent appear." They are also fully discussed in 6 Cruise's Digest, pp. 114–121, and in Jarman's chapter on Republication.

In *Hulme* v. *Heygate* (3) Sir W. Grant quotes and adopts the passage from Lord Ellenborough's judgment. At p. 295, dealing with intention, he says:—"It is not for them to show that it was the testator's intention to include this estate in the general operation of his codicil, but for the plaintiff to point out his positive intention to exclude it" . . .

The passage from *Goodtitle* v. *Meredith* (4) is cited by Williams in his note to *Duppa* v. *Mayo* (5).

Finally, in *Dickinson* v. *Stidolph* (6), Sir E. Vaughan Williams himself, delivering the considered judgment of one of the strongest Courts that ever sat, viz. Earle C.J., Williams J., Willes J., and Byles J., at p. 359 of the judgment, says:—"The cases which have occurred with respect to the effect of a codicil in republishing a will of realty appear to support the principle that the effect of such incorporation is to make it the duty of the Court to construe the two instruments in the same way, to allow the same operation to the language of the incorporated instrument as if it had been originally contained in the will" (this plainly means the codicil) "which incorporates it." The judgment refers to *Barnes* v. *Crowe* (7), and then quotes the passage from *Goodtitle* v.

(1) 3 Bro. P. C. 85.
(2) 7 Ves. 98.
(3) 1 Mer. 285, at p. 294.
(4) 2 M. & S. 5.
(5) 1 Wms. Saunders, at p. 440.
(6) [1861] 11 C. B. N. S. 341.
(7) 1 Ves. Jun. 486.

Meredith (1), and puts in italics the words "*independently of any intention,*" which are in ordinary type in the report of the case in 2 Maule & Selwyn. This seems to me conclusive that the passage I have quoted may be taken as an accurate statement of the law, and that the words "independently of any intention" are an essential part of it.

Practically all the old cases dealt with the effect of republication in including in a devise lands acquired between the dates of the will and codicil. Section 24 of the Wills Act made this immaterial, as in this respect it made the will prima facie speak from the death. In the first edition of Jarman, published shortly after the Act, the author says the doctrine of republication will lose much of interest, having regard to its slight effect in relation to the objects of the gift. However, in the last (9th) edition the editor points out that for some time past there had been considerable attention paid to this subject.

In the later cases on the subject, *In re Champion* (2) seems to be the authority cited as the accurate statement of the law. It may, perhaps, be taken as the date of the revival of attention to the principle of republication. It is very remarkable that though this principle is as much a rule of construction as the 24th section of the Wills Act, it only obtained a passing mention in Hawkins. *In re Champion* (2), though decided in 1893, was not referred to in *Mountcashell* v. *Smyth* (3), decided in 1895. The other cases I am about to refer to were all subsequent to *Mountcashell* v. *Smyth* (3).

In *In re Champion* (2), North J. says: "It is settled by authority that the effect of such a phrase as 'I confirm my will in other respects,' is a republication of a will, and when, under the old law, a testator had made a will which would merely pass the property he had at the date of it, and then by a codicil he confirmed and republished his will, the effect was to bring down the date of the will to the date of the codicil, and to make the devise in the will operate in the same way in which it would have operated if *the words of the will had been contained in the codicil of later date.* There is ample authority on the point." This judgment was affirmed by the Court of Appeal.

(1) 2 M. & S. 5, at p. 14. (2) [1893] 1 Ch. 101. (3) [1895] 1 I. R. 346.

Appeal. 1916.

GREALEY v. SAMPSON.

RONAN L.J.

In *Re Rayer* (1) Farwell J. quotes and adopts the principle of *In re Champion* (2) from the judgment of North J. The point was this:—Will in 1882, with directions that legacies and annuities charged on real estate should be paid without any deduction, except for *legacy* duty and income tax. In 1888 legacy duty was abolished, and *succession* duty and certain additional duties were charged on legacies and annuities charged on real estate. The testator made a codicil after the passing of the Act of 1888 not dealing with this matter. Farwell J. said it was not necessary for him to determine what the effect of the Act would have been if the will stood alone, "because after the Act this testator made a codicil by which, after making certain provisions which are immaterial, he expressly confirmed his will." He then quotes the judgment of North J., and proceeds: "Therefore I have, I apprehend, to treat this case as though there had been simply a devise after the Act of these rent-charges or annuities with a direction in the words that I have read, that they are to be paid without any deduction, except for legacy duty." He then points out that the new duties were more onerous than the legacy duty, and proceeds: "This variation would have caused me considerable difficulty if there had been no codicil confirming the will; but the joint effect of will and codicil is that I have *a document* directing payment of a rent-charge 'without any deduction except legacy duty,' made at a time when there was no duty called by that name, but another duty recently substituted for it called succession duty . . . I find here that the testator clearly expresses his intention [i.e. at the date of the document] that the devisees shall bear the burden of some duty, and I can give no effect to this expression of intention unless I regard 'legacy' as falsa demonstratio; or unless I read 'legacy' as equivalent to the succession duty substituted for legacy duty." He holds he can do this, and does so, saying "I should certainly defeat the expressed intention [once more expressed at the date of "the document"] if I held that the devisees took free from all duty."

In *Re Fraser* (3), Stirling L.J., delivering the judgment of the Court of Appeal (Vaughan Williams, Stirling, and Cozens

(1) [1903] 1 Ch. 688. (2) [1893] 1 Ch. 101. (3) [1904] 1 Ch. 726, at p. 734.

Hardy L.JJ.), states the effect of republication (he calls it confirmation) thus: "The effect of 'confirmation' is to bring the will down to the date of the codicil and effect the same disposition of the testator's estate as if the testator had at that date made a new will containing the same dispositions as the original will, but with the alterations introduced by the various codicils: see *Doe York* v. *Walker* (1) and *In re Champion* (2)." This is a remarkable case, as neither in the court below nor in the argument in the Court of Appeal was republication referred to. A by will gave all his personal estate not otherwise disposed of and except chattels real to trustees on certain trusts. He gave all real estate and chattels real in England that he might have at his death "except what I have disposed of by this my will" to his brother B. A made seven codicils. In the last he stated B was dead, but did not revoke the bequest to him or the general bequest of personalty. On the will the chattels real would have passed under the general gift on the principle of *Blight* v. *Hartnoll* (3). They were only excepted for the purpose of giving them to the brother. The doctrine of republication prevented the application of this doctrine, as the will and codicils were to be read as stated above; on the words as of the date of the last codicil, the real estate and chattels real were not disposed of, as it was made after the death of the brother. It is a strong case of the application of the rule. It is important also as showing that for purposes of construction the Court must place itself in the position of the testator at date of republication as regards the facts and circumstances that have to be considered. The result of the republication was that the objects who under the will would have taken the real estate, &c., did not take it.

In *Re Taylor* (4) there were a will and codicil. There was a gift over in the will. The question was whether the will should be read and construed first as of its own date and then given effect to, subject to the alterations made by the codicil (this would be the law apart from republication), or whether the alteration made by the codicil must be read with the will for all purposes, including the construction of the gift over. It was held that the

(1) 12 M. & W. 591.
(2) [1893] 1 Ch. 101.
(3) 23 Ch. D. 218.
(4) W. N. 1909, p. 59.

Appeal. 1916.

GREALEY v. SAMPSON.

Ronan L.J.

latter was the true effect. Swinfen Eady J. said "that the result of the confirmation of the will by the codicil was to bring the will down to the date of the codicil and effect the same disposition of the testator's estate as if she had at that date made a new will containing the same dispositions as the original will, but with the alterations introduced by the codicil"; and the gift over was read accordingly.

In the same year Warrington J., in *Re Donald* (1), applied the principle to the object of the gift.

In *Re Whitling* (2), Joyce J. says: "The effect of these last words ('in all other respects I confirm my said will') ... is now at all events well settled. The case of *Re Fraser* (3) decides that the effect of confirming a will as altered by a codicil is that the codicil is a republication of the will. There is no doubt about that." He then cites and adopts the passage I have already quoted from *Re Fraser* (3). In the first place, the case is important as showing that the effect of the words "I confirm my will," &c., was that they made the codicil operate as a republication of the will. By the will the residue was given to forty-two people (not a class) as tenants in common. By the codicil the testator revoked the gift as to two of the forty-two persons. Now, apart from the principle of republication, if it had been a mere case of will and codicil there can be no doubt that these shares would have been undisposed of. *Sykes* v. *Sykes* (4) is clear on this, but Joyce J., applying the principle of *Re Fraser* (3), held that the will was to be read as if the original gift to forty-two had been to the forty other than the two mentioned in the codicil. In other words, he substituted the forty for the forty-two as the objects of the residuary bequest. It is stated in the argument at p. 202 that the codicil in *Sykes* v. *Sykes* (4) confirmed the will; but this does not appear in either report of the case. Republication or its effect was not referred to. It would probably have enabled the real intention to have been carried out.

All the cases are in strict accordance with the rule as laid down in *Goodtitle* v. *Meredith* (5). This case was mentioned in the

(1) 53 Sol. Journal 673.
(2) [1913] 2 Ch. 1, at p. 5.
(3) [1904] 1 Ch. 726, 734.
(4) L.R. 4 Eq. 200; L.R. 3 Ch. 501.
(5) 2 M. & S. 5.

argument but not in the judgment in *Mountcashel* v. *Smyth* (1). *Dickinson* v. *Stidolph* (2) was not mentioned. The decision in *Mountcashel* v. *Smyth* (1) was put by Walker C., at pp. 359, 360, on this ground among others: "The will and codicil must be read together, and I think the codicil is itself an affirmation that the construction of the will as framed was intended to remain, and the stipulations and provisions to apply to the actual living husband, and not a possible second one." This would be an expression of intention to the contrary within the meaning of the authorities, and would prevent the normal result of republication. "But," he adds, "I think that though the republication brings down the will to that date for certain purposes, it does not alter the construction of the will's language. It does not interfere with the construction of the will in regard to the *objects* of the gifts. . . . The codicil may make the will speak as of 1855, but wherever it be necessary for determining the *construction* of the will on its language, the date of . . . 1836 *must* still be read into the will and codicil." The italics are mine. FitzGibbon L.J. says at p. 362:—"Upon the question of republication and whether the marriage of Lady Mountcashel excluded her from the power . . . I think the republication of the will has the same effect . . . as if the old document with all its words, including its date, were executed over again." Barry L.J. says, at p. 366:—"You *must* translate into the republishing document the date of the original will. The word 'hereafter' *must* be construed as referring to the date of the will (1836) . . ., although the codicil speaks from 1855." The italics in the case of the word "must" are mine.

In *Long* v. *Moore* (3), at p. 318, Barton J. says:—"The effect of the decision of the Court of Appeal in *Mountcashel* v. *Smyth* (1) is that republication republishes the will with all its contents, including its original date. It is as if the old document with its old date were translated into the codicil. . . . The authorities which have been cited lead me to the conclusion that the courts have always treated the principle that republication makes the will speak as if it had been re-executed at the date of the codicil not as a rigid formula or technical rule, but as a useful and flexible instrument for effectuating a testator's intentions by ascertaining

(1) [1895] 1 I. R. 346. (2) 11 C. B. N. S. 341. (3) [1907] 1 I. R. 315.

Appeal. 1916.

GREALEY v. SAMPSON.

Ronan L. J.

them down to the latest date at which they have been expressed."

This is a very important passage, and I am not surprised that Barton J. should have derived this inference from *Mountcashel* v. *Smyth* (1). But, in the first place, the republication according to the cases does not make the will speak "as if it had been re-executed at the date of the codicil." The last decision of the Court of Appeal on the subject (*Re Fraser* (2), already quoted) states the true principle:—"As if the testator had at that date made a new will containing the same dispositions as the original will." *Goodtitle* v. *Meredith* (3) is to the same effect.

In the next place, the passage I have quoted from the judgment of Barton J. does not appear to me a correct statement of a principle of construction which operates "independently of intention." In my opinion the rule is neither more nor less rigid or technical than the 24th section of the Wills Act. That must operate in the absence of contrary intention.

In *Bowes* v. *Bowes* (4), Lord Eldon giving judgment said, at p. 507: "The true question seemed to be, whether from the words in the codicil 'my said lands' a special intention to exclude the after-purchased estate did not appear . . .; but that indeed if their Lordships were not satisfied that such a special intention did appear, the general rule respecting the operation of a republication *must* operate in favour of the appellants." The Lords held there was such a special intention, and dismissed the appeal, Lord Thurlow dissenting. A clearer statement of the necessity for proof of "contrary intention" to prevent the operation of the rule it is impossible to conceive.

The rule of republication is just as rigid and imperative as the section of the statute, which has replaced it, in its application to the subjects of the disposition. The cases say that the will and codicil must be taken together as one document of the latter date. Nowhere, except in *Mountcashel* v. *Smyth* (1), and *Long* v. *Moore* (5), has it ever been suggested that the old date *must* be incorporated. I confess I find a difficulty in understanding what a new will of a later date, but at the same time of the former date, means. A simple test would be to apply the statements in these two

(1) [1895] 1 I. R. 346.
(2) [1904] 1 Ch. 726.
(3) 2 M. & S. 5.
(4) 2 Bos. & Pul. 500.
(5) [1907] 1 I. R. 315.

cases to sect. 24. It would read thus:—"Every will shall be construed . . . to speak and take effect as if it had been executed immediately before the death, but at the same time as if made at the time of its date." It is obvious, of course, that under sect. 24 and in cases of republication, the date of the will *may* be looked at for the purpose of ascertaining a "contrary intention"; but this is a wholly different matter.

As far as I know, *Mountcashel* v. *Smyth* (1) is the only case in which it has been suggested that the doctrine of republication only applies to the subjects of the gifts as distinguished from the objects. Instances of the following kind have been discussed in the text-books and cases. I leave my black horse Rupert to my groom John, and the horse dies and I get another black horse and call him Rupert, and then republish my will and die. Neither the republication nor the 24th section will pass the second horse under the will. Why? For the same reason in both cases—contrary intention. See Hawkins, 2nd edition, p. 25: "effect of specific description," and "if the thing intended be individualized by a special description." The same principle applies to the object of the gifts in the case of republication. In the case of the horse that I have put above, if the groom had died instead of the horse, and the testator had got another groom named John, the result would have been the same in the case of republication, and for the same reason. The section would not apply in this case. The case of *Perkins* v. *Mickelthwaite* (2) is a curious illustration. Testator gave property by his will to his son A. A died; the testator had another son whom he called A. He then republished his will by a codicil, which gave the second A a legacy. Prima facie there would be "a contrary intention" arising from the lapse of the original gift. But the legacy in the codicil was stated to be "over and above what I have given him by the will." This was held to rebut the contrary intention arising from the lapse, and A the second was held entitled to the original gift, also on the principle of republication. It was only by reading the will as made at the date of the codicil that any gift to A the second could be found in it. The cases as to contrary intention are collected in the note to sect. 24 in Carson's

(1) [1895] 1 I. R. 346.

(2) 1 P. Wms. 274.

Appeal. 1916.

GREALEY v. SAMPSON.

Ronan L.J.

Real Property Statutes. Each case must depend on its own facts. Barton J. refers to *Doe*, d., *Biddulph* v. *Hole* (1). That case was expressly decided on the ground of contrary intention. (See p. 858.)

There are numerous cases as to how far such words as "my house," "the house I now live in," indicate a "contrary intention." In *In re Champion* (2) the words were, "the whole of my said freehold orchard cottage with all the land, &c., situate in the parish of Dorking, and now in my own occupation." Part of the lands were not in his occupation at the date of the will, but were at the time of the republication and death. North J. says, at p. 107: "Are the words, 'now in my own occupation,' a mere additional description which, though inaccurate, is not vital, or are they an essential part of the description?" He finds that they were not such a part of the description, and, therefore, not evidence of a contrary intention.

At p. 362 of *Mountcashel* v. *Smyth* (3), FitzGibbon L.J. says: "I can find no case in which the objects in a will have been held to be altered by republication" (I have already dealt with this). "In such a case as this the date is, in effect, part of the description of the objects." That is, he applies to the *object* almost the identical words that North J. applies to the subject. It is difficult to imagine a clearer proof that the two things occupy the same position in relation to republication. If he had rested his judgment on the ground of "contrary intention," I should have had no fault to find with it.

As to the statement by Walker C. that republication "does not interfere with the construction of the will in regard to the *objects* of the gift," I can only say that he was not referred to 1 Williams on Executors, pp. 172, 173, nor to the passage in Jarman already quoted as to its "slight effect" in this regard, and the cases referred to by these writers. The subsequent cases of *Re Fraser* (4), *Re Donald* (5), *Re Taylor* (6), and *Re Whitling* (7), already cited, seem to me to be express decisions to the contrary.

To these I may add the following Irish case:—In *Cooper* v. *Cooper* (8) A in 1841, by will, gave consols to trustees upon

(1) 15 Q. B. 848.
(2) [1893] 1 Ch. 101.
(3) [1895] 1 I. R. 346.
(4) [1904] 1 Ch. 726.
(5) 53 Sol. Jour. 673.
(6) W. N. 1909, p. 59.
(7) [1913] 2 Ch. 6.
(8) 6 Ir. Ch. 217.

trust to pay the rents to B "for the term of her life, provided she does not marry: and from and after her decease or marriage" for other persons. In 1847 A himself married B. In 1849 he made a codicil which revived and republished the will. The Lord Chancellor, at p. 223, says, "Looking at what took place, and at the fact that she had married the testator himself, it would be a very strong thing to decide that where by his own act he induced her to break the condition, she was to be deprived of all this estate." At the same time it must be remembered that it was expressly given to the "other persons" in that event. He then says, "I must, however, treat the codicil as a republication, and therefore as declaring that at all events at the date of its execution it was his will that she should take this property unless she should afterwards marry. . . . Taking it on the whole construction and facts, I must hold it to be given to B until her death or marriage, and that the devise is now valid in her favour." In this case the codicil did not in any way deal with the provision for B. I may point out that if the views of Walker C. and FitzGibbon L.J. as to the objects of the will are correct, the principle of republication could only apply to the subjects. As to this, sect. 24 has entirely displaced the doctrine. Consequently the doctrine should have disappeared when the section passed except as to antecedent matters. The only authority I can find for these various statements in the judgments in *Mountcashel* v. *Smyth* (1) and *Long* v. *Moore* (2) are some observations (not intended to be final) of Lord Cranworth in a case of *Stillwell* v. *Mellersh* (3) reported in the Law Journal. Lord Cranworth says (p. 361):—"In my opinion then when it is said a codicil republishing a will or confirming a will makes the will speak from the time of republication, that does not mean you are to read the will in any way different from the mode in which it would have been read if the testator had died the moment after he had executed it." Let us say, will in 1850; republication in 1855; death in 1860. Devise of all my lands. Is the will to be read as if the testator died in 1850? If so, no lands acquired after that date would pass. Apart from sect. 24, it was quite settled that lands acquired prior to 1855 would pass, and under the Act that lands acquired prior to 1860 would pass, but in each case only in the absence of contrary intention.

(1) [1895] 1 I. R. 346. (2) [1907] 1 I. R. 315. (3) 20 L. J. N. S. Ch. 356.

Appeal. 1916.

GREALEY v. SAMPSON.

Ronan L.J.

Therefore the will must be read in a different mode from that in which it would have been read if the testator had died in 1850. It must under the Act, in the words of the section, be "*construed* to speak and take effect as if executed" in 1860 as to its subjects, and under the rule, for all purposes as if made in 1855. Lord Cranworth would certainly not have allowed this sentence to remain unaltered if he had revised his judgment. He proceeds: "What absurdities otherwise would arise. Suppose I by my will say I give £500 to the present treasurer of Lincoln's Inn, and this day twelve months I republish my will, does that alter the party who is to take the legacy? That must be so if it is to be read as if I had written it over again; the 'present' treasurer would be a different person." Now comes what, in my opinion, is a vital passage. "So I conceive if I had said I devise all the estates of which I am now seised. I afterwards purchase lands and republish my will. I confess I think the same principle applies as governed Lord Cottenham in *Cole* v. *Scott* (1)." There is no possible doubt or ambiguity here. We have the clear authority of Lord Cranworth for two propositions:—"1, That in republication the same principle applies to the subjects and to the objects of the gift; 2, That that principle is the principle on which *Cole* v. *Scott* (1) was decided. *Cole* v. *Scott* (1) was a case under sect. 24 of the Wills Act. The devise was of "all the estates of which I am now seised or possessed." He acquired estates after the date of the will. At p. 527 Lord Cottenham says: "The statute having provided that a certain rule shall prevail, 'unless a contrary intention shall appear by the will,' it is not necessary to find that contrary intention expressed in so many words, or in some way quite free from doubt. Now, I find on the construction of the will in question, adopting those rules of construction which are usually adopted in construing wills, that the contrary intention does appear: the result, therefore, is to take the case out of the section of the Act." He then discusses the effect of the word "now," as has been done in many cases. In *Re Park* (2), Parker J. refers to the case of the "present treasurer," and says: "If you read the will at a subsequent date, the legatee might have been entirely altered. I do not think the doctrine of republication has ever been carried to that extent." No, there is contrary intention.

(1) 1 MacN. & G. 518. (2) [1910] 2 Ch., at p. 328.

Appeal.
1916.
GREALEY
v.
SAMPSON.
Ronan L.J.

It seems to me, therefore, that this judgment of Lord Cranworth's goes the full length of my proposition that the rule of republication is really expressed by sect. 24, with the alterations I have mentioned. Lord Cranworth discusses the terms of the particular will. These observations seem to me rather to read as if he had overlooked the principle of the necessity for "contrary intention," according to *Cole* v. *Scott* (1), and thought it necessary to find actual intention, as if there had been no statute or no rule as to republication. He says, however, "I was not prepared for this kind of argument." It is obvious that the case of the "present treasurer" is a case of contrary intention.

It is very remarkable that in *Mountcashell* v. *Smyth* (2), and *Long* v. *Moore* (3), this vital principle of contrary intention does not seem to have been considered. Having regard to the subsequent cases, to the earlier cases not referred to, and to the omission to notice that republication operates independently of intention, I have thought myself at liberty to consider the various dicta in *Mountcashell* v. *Smyth* (2) that I have referred to. Having done so, I am unable, for the reasons I have given, to accept them.

There is one other matter to which I must refer. In this case the first codicil expressly confirms the will. The second codicil does not, but it clearly refers to it. In *In re Smith* (4), Stirling J. cites, and adopts, the following passage from 1 Williams' Executors, p. 141 :—"A codicil will amount to a republication of a will to which it refers, whether the codicil be or be not annexed to the will, or be or be not expressly confirmatory of it; for every codicil is in construction of law part of a man's will, whether it be so described in such codicil or not."

The dates in this case are—the will, July 1st, 1878; first codicil, January 24th, 1880; marriage of son Charles, October 22nd, 1880; second codicil, April 28th, 1881. There is no doubt the will was republished on April 28th, 1881.

It so happens that in *Re Champion* (5) and the subsequent cases the codicils did contain words of confirmation, and the judgments all speak of the confirmation, following *Re Champion* (5). In that

(1) 1 MacN. & G. 518.
(2) [1895] 1 I. R. 346.
(3) [1907] 1 I. R. 315.
(4) 45 Ch. D. 632, at p. 636.
(5) [1893] 1 Ch. 101.

Appeal. 1916. GREALEY v. SAMPSON. Ronan L.J.

case it will be observed that in the first instance North J. says that such a phrase as, "I confirm my will in all respects," is a republication of the will. He then states the effect, and refers to "the ample authority" of the four cases he refers to. In three—*Beckford* v. *Parnecott* (1), *Yarnold* v. *Wallis* (2), and *Barnes* v. *Crowe* (3)—there was no confirmation; in the fourth—*Doe* d., *York* v. *Walker* (4)—there was confirmation. But in all it was held there was republication. It was, therefore, with the effect of republication that he was dealing. *Yarnold* v. *Wallis* (2), one of the cases in which there was no confirmation, is the only case in which he quotes the judgment.

In the leading case of *Goodtitle* v. *Meredith* (5), in *Pigott* v. *Waller* (6), in *Bowes* v. *Bowes* (7), in the House of Lords, and in other cases, there was no confirmation; but it was never held that this prevented the full effect of republication. Indeed, they all really decide the reverse.

The point of no confirmation was raised in *Re Earl's Trusts* (8). There were two codicils (both prior to the Wills Act): the first confirmed the will; the second did not. Wood V.-C. held that the second operated as a republication so as to pass after-acquired land. He says: "This codicil is expressed to be a second codicil to the will; and there being nothing in it to indicate a contrary intention, its effect is to enlarge the operation of the will, to cause the will to pass lands acquired since the will was executed"; that is, the will was to be read as if made at the date of the codicil.

Doe d., *York* v. *Walker* (4) would appear to show that "confirmation" gives some additional effect to republication. On the other hand, the judgments in *Doe* d., *Biddulph* v. *Hole* (9), and *Re Park* (10), would rather show that confirmation diminishes the effect of republication. It seems to me clear, however, that all the cases I have cited were decided on the ground of republication.

Taking the effect of republication as stated in *Goodtitle* v. *Meredith* (5) and the other cases, how does this case stand? Read the will and codicil together as of the date of the codicil, and by

(1) Cro. El. 493.
(2) 4 Y. & C. 160.
(3) 1 Ves. J. 486.
(4) 12 M. & W. 591.
(5) 2 M. & S. 5.
(6) 7 Ves. 98.
(7) 2 Bos. & Pul. 500.
(8) 4 K. & J. 673.
(9) 15 Q. B. 848.
(10) [1910] 2 Ch. 328.

the light of the facts as existing at that date: see *Re Rayer* (1). The testator has a son married. This appears in the codicil. He gives that son's wife a jointure of £200 a year by the codicil, and he provides by the will of even date thus—"And in case my said son shall marry, I authorize him to appoint a jointure not exceeding £200 per annum." Is there anything to show that he intended the wife, to whom he had given £200, to have the second £200? The obvious intention was the other way; and in this case the application of the principle of republication, so far from being contrary to the testator's intention, plainly carries it out.

MOLONY L.J.:—

I have had the pleasure and advantage of reading the judgment of my colleague, Lord Justice Ronan, and of conferring with him in reference to it. I find myself in complete agreement with the views he has expressed, and cannot usefully add anything to them.

Solicitors for the appellant: *Hayes & Son.*
Solicitors for the respondents: *William Roche & Son.*

A. E. C.

(1) [1903] 1 Ch. 685.

Barton J.
1917.
Jan. 16.

KELLY *v.* O'CONNOR.
(1915. No. 146.)

Administration — Will — Costs of unsuccessful action to obtain Probate — Deficiency of Assets—Donatio mortis causâ—"Testamentary expenses."

Two persons, who were named as executors in what purported to be the will of the deceased, on the advice of senior counsel, instituted an action to obtain a grant of probate of the alleged will. The jury found against the alleged will, which was condemned, but the executors were declared entitled to their costs out of the assets.

Subsequently to the trial of the probate action a suit was brought for the administration of the estate of the deceased, which mainly consisted of a sum of £923 standing on deposit receipt. These moneys were adjudged by Barton J. and by the Court of Appeal to have been the subject-matter of a good donatio mortis causâ to R. Nearly all the costs incurred by the executors in the Probate action had been incurred before R. put forward his claim to the ownership of the deposit receipt. There was a deficiency of assets.

Held, that the moneys on deposit receipt were not assets, and were not liable for the payment of any of the costs of the probate action.

Michael D'Arcie, of Fethard, Co. Tipperary, died on June 2nd, 1911, having previously executed a document purporting to be his last will. The executors therein named, William Toppin and James Kenrick, on the advice of senior counsel, instituted an action to obtain probate. The alleged will was condemned at the trial, and by Order, dated 29th of October, 1913, the judge pronounced against the force and validity of the alleged last will of the deceased, but declared the plaintiffs entitled to have their costs out of the assets.

A suit was afterwards instituted for the administration of the personal estate of Michael D'Arcie. In the course of that suit William Toppin and James Kenrick applied to the Court for an order that the defendant Richard Maher should pay to the applicants their costs of the action brought by them to establish the will of the deceased Michael D'Arcie, or for an order that the said costs should be paid out of the money represented by a deposit receipt for £923, which had been declared to have been

the subject of a good donatio mortis causâ by the deceased to Richard Maher. The claim of ownership had not been put forward by Richard Maher until nearly all the costs of the probate action had been incurred.

Wylie K.C. and *Ronayne*, for the applicants:—

1. These costs are testamentary expenses, that is, expenses incident to the proper performance of the duty of an executor: *Sharp* v. *Lush* (1); *Brown* v. *Burdett* (2); *In re Elementary Education Acts, 1870 and 1873* (3). In *In re Prince*, *Godwin* v. *Prince* (4), the costs of a plaintiff impeaching the validity of a will were held not to be "testamentary expenses." But that was a case of a person challenging the will, and not a mere mode of getting a decision as to the validity of the will by requiring it to be proved in solemn form. The costs of executors in a probate action incurred in endeavouring to uphold the will of their testator are "testamentary expenses." It is the duty of an executor to go on to prove the will, and he is entitled to his costs if he acts reasonably. His position rests on a very different basis from that of one who comes forward to challenge the will. See the observations of Stirling J. in *Godwin* v. *Prince* (5); see also *In re Clemow*, *Yeo* v. *Clemow* (6).

2. Testamentary expenses (where the assets are deficient) are payable out of the subject-matter of a donatio mortis causâ, which, in this case, is the deposit receipt for £923: *Drury* v. *Smith* (7), referring to *Smith* v. *Casen* (8), from which it would appear that jewels given by a testator by way of donatio mortis causâ were subject to his debts. The subject-matter of a donatio mortis causâ is liable to debts on deficiency of assets: Ingpen on Executors, p. 341; *Tate* v. *Leithead* (9). We submit that testamentary expenses stand on the same footing.

Conner K.C. and *Kinahan*, for Richard Maher:—

A donatio mortis causâ differs from a legacy because probate is unnecessary. The donee takes it as a gift from the donor in his

(1) 10 Ch. D. 468.
(2) 53 L. J. Ch. 56.
(3) [1909] 1 Ch. 55, 59.
(4) [1898] 2 Ch. 225.
(5) [1898] 2 Ch., at p. 228.
(6) [1900] 2 Ch. 182.
(7) 1 P. Wm. 404, 406.
(8) Decided 8th Decr. 1718.
(9) Kay 658, 659.

Barton J. 1917. KELLY v. O'CONNOR.

lifetime, and not under a testamentary act: Williams on Executors (1905 ed.), vol. 1, p. 599. Consequently no act of the executor is required to perfect the title of the donee. The gift takes effect immediately, and does not wait for the death: *Tate* v. *Gilbert* (1); *Ward* v. *Turner* (2). Our client is claiming against the estate. He has been successful in his claim. There are no assets, and in the circumstances the costs of the abortive probate action are not payable by him or out of the proceeds of the deposit receipt which is his property.

An executor is not bound to propound a will unless he chooses to do so: Maxwell on Probate Practice, p. 208. The costs incurred by the executors in this case are not testamentary expenses, and the subject-matter of a donatio mortis causâ is not liable to them.

In *Tate* v. *Hilbert* (3) as regards this form of gift Lord Loughborough says:—"I should think it not within the jurisdiction of the Ecclesiastical Court; and that the property so given is not to be possessed by the executor. It is bad against creditors; and, therefore, within the reach of creditors; but does not regularly fall within an administration, or require any act by the executor to constitute a title in the donee." See also Williams on Executors, p. 600, where the author says that a donatio mortis causâ is liable for debts, and that by the express provisions of the statute 8 & 9 Vict. c. 76, s. 4, it is to be deemed a legacy within the meaning of the Acts relating to duties on legacies. See also 44 Vict. c. 12, s. 38, sub-s. 2, and sect. 2 of the Finance Act, 1894, as to estate duty.

BARTON J.:—

The applicants were named as executors in a document which purported to be the last will of Michael C. D'Arcie, deceased, whose estate is being administered in this suit. The question for decision is whether they are entitled to an order that their taxed costs of an unsuccessful action to prove Michael C. D'Arcie's alleged will should be paid to them out of a deposit receipt for £923, standing in the name of the deceased in the Munster and Leinster Bank at Fethard, Co. Tipperary, which has been held by

(1) 2 Ves. Jun. 11, 116. (2) 2 Ves. Sen. 431, 434. (3) 2 Ves. Jun. 120.

this Court and the Court of Appeal to have been the subject-matter of a valid donatio mortis causâ from Michael C. D'Arcie to Richard Maher.

So far as the merits of the application are concerned, the applicants can point to three circumstances which, as they submit, justified them in incurring these costs—1, the action was instituted bona fide, after an opinion in favour of its institution had been obtained from senior counsel; 2, the Judge at the trial declared the applicants entitled to their costs of the action out of the assets of the deceased; and, 3, no serious claim on foot of the donatio mortis causâ was put forward until the probate action had reached a stage when nearly all the costs had been incurred. I assume that these costs may be treated as if they had been proper testamentary expenses.

The question remains whether, in the event which has happened of a deficiency of assets, the plaintiffs are entitled to resort to the deposit receipt for payment. That question must, in my opinion, be answered in the negative. The order of the Judge in the probate action, declaring the applicants entitled to their costs out of the assets, does not help them, because the deposit moneys are not assets. It is true that a donatio mortis causâ is liable to the debts of the donor in case of deficiency of assets; but that is because the gift would otherwise be fraudulent as against creditors: *Smith* v. *Casen* (1), cited in *Drury* v. *Smith* (2); *Tate* v. *Hilbert* (3); *Tate* v. *Leithead* (4). It required the intervention of the Legislature to make a donatio mortis causâ liable to legacy duty and estate duty: Revenue Act, 1845, sec. 4; Finance Act, 1894, 2 (*c*).

In my opinion the moneys on deposit receipt are not liable for the payment of these costs.

Solicitors for applicants: *Mackenzie & Son.*
Solicitors for Richard Maher: *Arnold Power.*

R. W. L.

(1) 8th Decr. 1718.
(2) 1 P. Wm. 406.
(3) 2 Ves. Jun. 120.
(4) Kay, 658, 659.

Appeal.
1917.
Feb. 2.

BAKER *v.* BLOUNT AND OTHERS (1).
(1912. No. 930.)

Will—Construction—Gift of Income derived from Estates—Disposition of Residue of "my income, estates," &c.—Corpus given by Gift of Income—Contrary Intention.

A testatrix gave to her husband "one half of the income derived from my share in estates in Ireland," and made a disposition of "the residue of my income, estates," etc., in favour of her daughter.

Held, that there was nothing in the will to indicate an intention to cut down the devise to the husband of the absolute interest in the corpus contained in the gift of the income of the estates.

APPEAL from an order of Barton J., whereby it was declared that on the true construction of the will of Annie Ethel Blount, the defendant William Valentine Blount was entitled to one-half of the income of the share of the testatrix's estates in Ireland, and of the proceeds of the sale thereof, whether sold in her lifetime or after her decease, for the term of his life only, and that the defendant Ethel Marie Josephine Carton was entitled to the residue of the income of the testatrix in her share of the estates, and of the proceeds thereof, and to the rest, residue, and remainder of the estate of the testatrix, including therein the corpus of and proceeds of sale of the Irish estates. In lieu of this order the defendant, William Valentine Blount, asked for a declaration that he was entitled to one equal moiety of the corpus of the share of the testatrix's estates in Ireland, and of the proceeds of the sale thereof, and the income thereof, absolutely.

The will of Annie Ethel Blount, who died in France on the 30th July, 1906, was as follows:—"I give and bequeath unto my maid, Louise Dubois, the sum of £50 per annum, payable monthly, which, at her decease, is to revert to my daughter Ethel; to my husband, William Valentine Blount, one-half of the income derived from my share in estates in Ireland; the residue of my income, estates, and all or any property I may die

(1) Before SIR IGNATIUS J. O'BRIEN C., and RONAN and MOLONY L.JJ.

possessed of, including jewellery, furniture, household effects, &c., to my said daughter, Ethel Marie Josephine Carton."

The plaintiff, as a creditor of the testatrix, brought an action for the administration of her real and personal estate. The question for decision was whether the testatrix devised the corpus of her share of her estates in Ireland in moieties between her husband and her daughter, or whether she gave a moiety of the income to each for life, and the corpus to the daughter. Barton J. adopted the latter view, and from his decision to that effect, the defendant, William Valentine Blount, appealed.

H. Wilson K.C., *Oulton K.C.*, and *Murnaghan*, for the appellant:—

It is a well-established rule that a devise of the income of land passes the land itself, and, since the Wills Act, 1837, such a devise carries the fee-simple, unless, in the words of sect. 28 of that Act, a contrary intention shall appear by the will. The testatrix in this case devised absolutely the corpus of half her estates in Ireland to the appellant, and there is nothing in the will which shows an intention to cut down that devise. The rule yields to expressions in the will indicating a contrary intention only when such intention is clearly shown: *Coward* v. *Larkman* (1), per Kay J., at p. 279. In the Court of Appeal (2) and in the House of Lords (3) the rule, as laid down by Kay J., was adopted. [They also relied on *Blann* v. *Bell* (4).]

S. L. Brown K.C. and *Littledale K.C.* (with them *Marnan*), for the respondents:—

The testatrix made a very clear distinction between "income" and "estates," and showed that she did not intend the gift of the "income" derived from her estates in Ireland to carry the corpus of these estates. The clause in the will beginning, "the residue of my income, estates," &c., was residuary only as to income, as it contained a specific devise of her real estates. If she had given the corpus in the first instance, she would not have given it over again.

Counsel for the appellant were not called upon to reply.

(1) 56 L. T. 278.
(2) 57 L. T. 285.
(3) 60 L. T. 1.
(4) 2 De G. M. & G. 775

Appeal. 1917.

BAKER *v.* BLOUNT.

SIR IGNATIUS J. O'BRIEN C.:—

We are satisfied that the construction put on this will by Mr. Justice Barton cannot be sustained, and that, accordingly, the appeal should be allowed. In construing a document like a will, different minds may naturally take different views; but no matter how the will in this case be approached, it can, to my mind, bear only the construction which we put upon it. This is, I think, as clear a case as ever came before a Court.

The principle that a gift of the income of an estate, or the devise of an estate to a person without any words of limitation, conveys the corpus, unless a contrary intention is expressed, is of course not disputed; and prima facie the words "to my husband, William Valentine Blount, one half of the income derived from my share in estates in Ireland," taken by themselves, amount to a clear specific devise of half these estates to the husband of the testatrix. It is said, however, that there are other provisions in the will importing a contrary intention. In the Court below it was assumed that the annuity of £50 to Louise Dubois was a charge on all the property; but it is quite clear that it was not charged upon what was specifically devised. Upon the death of the annuitant, the annuity was to "revert" to the daughter of the testatrix. Barton J. was of opinion that the word "revert" implied that the annuity was to revert to her as the person who was the devisee of the inheritance. In my opinion, the use of the word "revert" does not indicate a contrary intention. Even if the annuity was charged on the whole estate, it would not affect the construction of the will, because in that event there would be a reverter equally to William Valentine Blount and to Ethel Blount.

It has been argued that the clause, "the residue of my income, estates, and all or any property I may die possessed of, &c., to my daughter, Ethel Marie Josephine Carton," although on the face of it a residuary disposition, must not in this case be treated as such. It is quite possible to introduce into a residuary clause words which may have the effect of defeating the real object of the testator; but a residuary gift following a specific devise, as in this case, can give only what is left. What the testatrix gave in this clause of

the will was the residue of her income, of her estates, and all her other property. Although the grammar may not be strictly accurate, it is to my mind perfectly plain that the final clause relied upon, as showing an intention contrary to that implied in the general rule, is solely a residuary disposition, and I refuse to read into it words which would deprive it of its statutory force.

RONAN L.J. :—

There are only three gifts contained in this will, namely—(*a*) a life annuity; (*b*) a specific devise which, standing alone, is admitted to be a clear devise in fee of one moiety of the testatrix's share in estates in Ireland; and (*c*) a gift of residue. The residuary gift comprises in one mass what is left of freehold, leasehold, and personal estate. The annuity is a charge on the residue; it is not, of course, a charge on the specific devise.

I cannot understand the statement that the annuity is "charged on the whole estate." There is no express charge; but it is a charge on the residuary real estate, under the rule in *Greville* v. *Browne* (1). This residue is given to the daughter, and, therefore, as on the death of the annuitant the annuity ceases to be payable out of the residue, it, in this sense, reverts to the daughter. I can find nothing in this to cut down the effect of the specific devise to the husband. There only remains the residuary gift. It was argued before us that the clause beginning "the residue of my income, estates," &c., is not a residuary gift. I can only say that I have been unable to appreciate the argument. I wholly fail to see in this will any evidence of a contrary intention within the meaning of sect. 28 of the Wills Act, or anything to cut down or limit the operation of the specific devise to the husband.

MOLONY L.J. :—

It has been held in several cases, including *Mannox* v. *Greener* (2), that the devise of the income of an estate passed the fee. Lord Watson states the rule very distinctly in *Coward* v. *Larkman* (3), where, at p. 3, he says :—"The rule of construction by which a general and unlimited gift of the income of real or

(1) 7 H. L. C. 689. (2) L. R. 14 Eq. 456. (3) 60 L. T. 1.

Appeal. 1917.

BAKER v. BLOUNT.

Molony L.J.

personal estate is held to carry an absolute interest in the corpus is established beyond dispute."

In this case there is a perfectly clear devise by the testatrix of the entire interest of one-half her share in the Irish estates, unless we can discover in the will a contrary intention. Now, a contrary intention within the meaning of sect. 28 of the Wills Act must be very clearly shown; and in construing a will one must not scrutinize every word with close particularity in order to find out a contrary intention where such intention is not apparent on the face of the will itself. In this connexion the observations of Kay J. in *Coward* v. *Larkman* (1), referred to, with approval, by Lord Fitz Gerald in the same case (2) in the House of Lords, at p. 4, are of importance.

Is there anything in this will which indicates a contrary intention? The will seems to me to be very simple. In the first place we have the annuity to the maid of £50 payable monthly; the testatrix shows that she knew how to limit an annuity to a person's life, because on the death of the annuitant the annuity was to go to her daughter, the person who took under the residuary gift. Instead of indicating a contrary intention, this part of the will establishes that the testatrix understood what was and what was not a life interest.

We have to deal with the gift to William Valentine Blount of "one-half of the income derived from my share in estates in Ireland." It is admitted that these words standing alone carry the corpus; and the only point relied upon to prove a contrary intention is the use of the word "estates" in what is actually a residuary gift. Although not expressed with grammatical accuracy, the disposition of "estates" in this part of the will is an ordinary residuary gift, and it does not indicate any intention to cut down the previous devise of the full beneficial interest in the corpus.

Solicitors for the appellant: *E. & G. Stapleton.*
Solicitor for the respondents: *George T. Roe.*

C. L.

(1) 56 L. T. 278. (2) 60 L. T. 1.

IN THE MATTER OF THE LONGVALE BRICK AND LIME WORKS, LIMITED. BETWEEN OLIVIA NORA COLQUHOUN ON BEHALF OF HERSELF AND ALL OTHERS THE HOLDERS OF FIRST MORTGAGE DEBENTURES OF THE DEFENDANT COMPANY, PLAINTIFF, AND THE LONGVALE BRICK AND LIME WORKS, LIMITED, DEFENDANTS (1).

Appeal. 1917. April 13, 16.

Sale of Incumbered Lands by the Court—Re-opening Biddings—Auctioneer appointed by Court—Mistake—Innocent misrepresentation by Auctioneer as to value of property sold—Confirmation of Sale—Re-sale—Sale of Land by Auction Act, 1867 (30 & 31 *Vict. c.* 48).

At a sale of lands under the order of the Court by an auctioneer appointed by the Court, the latter, owing to an innocent mistake on his own part, stated the amount of certain conacre lettings which had been made of portion of the lands sold, and which was to belong to the purchaser, to be £146 6*s.* 9*d.*, whereas the true figures were £332 12*s.* 1*d.* The mistake was not discovered until after the sale, at which M., the present appellant, was declared the highest bidder for £4300, and he paid his deposit on the purchase-money. This bid exceeded the reserve price fixed by the Court. D., who had bid £4260 at the sale, then increased his offer to £5000. The Chief Clerk refused to issue his certificate confirming the sale until the matter had been brought before the Court, and on an application for directions the Master of the Rolls directed the lands to be again put up for sale, D. undertaking at such resale to make an initial bid of £5000.

Held, by the Court of Appeal, affirming the order of the Master of the Rolls, that the error was one by an officer of the Court acting as such; that there had been improper conduct in the management of the sale within sect. 7 of the Sale of Lands by Auction Act, 1867; and that, apart from the latter section, the Court had power under its general jurisdiction to refuse to confirm the sale in the circumstances which had arisen.

APPEAL.

This was a debenture-holders' action, in the course of which, on the 20th February, 1917, certain lands the property of the defendants were put up for sale by public auction, the defendants having carriage. These lands consisted in part of a lime and

(1) In the Court of Appeal, before SIR IGNATIUS J. O'BRIEN C., and RONAN and MOLONY L.JJ.

Appeal. 1917. *In re* LONGVALE BRICK AND LIME WORKS.

brick works, certain dwelling-houses, and agricultural lands. The conditions of sale, having referred to an order dated the 15th June, 1917, stated as follows: "By said lastly mentioned order liberty has been given to let all the lands in conacre for the season ending 1st November, 1917, and the purchaser will be entitled to the benefit of such lettings as may be so made." Subsequent to the preparation of the conditions of sale, and prior to the sale, the lettings in question were made, and they produced a rental of £332 12s. 1d. At the opening of the sale, the solicitor for the plaintiff asked the auctioneer (who had been appointed by the Court) the amount of the conacre lettings, whereupon the auctioneer, having referred to a book which contained the particulars of the lettings, stated the figures to be £146 6s. 9d., and the sale proceeded on this basis. The mistake arose from the auctioneer reading out the figures on one page, without noticing that the account was carried over to the next page. Wm. M'Kean was declared the highest bidder at the sale at £4300, a sum which in fact exceeded the reserve price fixed by the Court. He signed the bidding paper, and paid a deposit of 25 per cent. on the purchase-money. The next highest bidder was Wm. Doherty, who bid £4260. Two days after the sale Doherty wrote to the solicitor having carriage, drawing attention to the mistake which had been made, and offering to purchase the property for £5000. When the matter came before the Chief Clerk he refused to issue his certificate confirming the sale, pending directions by the Master of the Rolls.

In an affidavit filed by the plaintiff she stated as follows:—

"I considered the price £4300 fair, although considerably short of sufficient to pay my debentures, which are for £6000, with two years' interest in arrear at four per cent. on the entire undertaking of the company . . . therefore whilst I cannot say that £4300 is an undervalue, I am naturally desirous that the substantially increased offer of £700 now made, and any further sum which can be got without an absolutely new sale, which I believe would be risky for me, should be obtained."

It was deposed to by M'Kean, and not denied, that Doherty at the conacre lettings had himself bid for and taken portion of the lands at rents amounting to over £217.

On the matter coming before the Master of the Rolls for directions, the learned judge directed the property to be again put up for sale by public auction, Doherty by his counsel undertaking to make at such resale an initial bid of not less than £5000. The order also provided for the return to M'Kean of the money paid by him as a deposit, and he was declared entitled to the costs incurred by him, when taxed, as a first charge on the proceeds of the sale of the property when realized.

Against this order M'Kean appealed to the Court of Appeal.

Leech K.C. and *Chadwick*, for the appellant:—

The order of the Master of the Rolls involves the very mischief aimed at by sect. 7 of the Sale of Land by Auction Act, 1867. It amounts to a reopening of biddings on the question of value only. The mistake made has no materiality, except in so far as, if at all, it affected the price. The reserve price, however, was reached, and what is admittedly a fair price for the property was obtained. There was no fraud, and there was no improper conduct in the management of the sale, which, within the meaning of sect. 7, must amount to fraud, or to something in the nature of, or bordering on, fraud: see judgment of Malins V.C. in *Delves* v. *Delves* (1). In *Griffiths* v. *Jones* (2), at p. 281, James L.J. said: "It would be very inconvenient if a contract made between vendor and purchaser could, merely on the ground of some mistake by an agent, be set aside. . . . The mistake, if any, was through neglect on the part of the vendors; and it is now quite clear that biddings cannot be opened except for fraud." In Fry on Specific Performance (5th ed., p. 377), the learned author states, referring to *Webster* v. *Cecil* (3), "Such a mistake will not be a ground for opening biddings, which can now only be opened for fraud." The mistake of the auctioneer was that of an agent of the vendors, not of an officer of the Court: *Re Banister* (4); *Sanderson* v. *Walker* (5). There is no proof that anyone would have bid more if the true figures had been given. Doherty himself knew they were incorrect, as he had himself taken lettings amounting to £217. His present

(1) L. R. 20 Eq. 77.
(2) L. R. 15 Eq. 279.
(3) 30 Beav. 62.
(4) 12 Ch. D. 131, 141.
(5) 13 Ves. 601.

Appeal. 1917.

In re LONGVALE BRICK AND LIME WORKS.

offer is an afterthought. The amount of the lettings in conacre for one season is no criterion of the value of the lands, and would not affect the mind of a purchaser. [They also referred to *Woods* v. *Brown* (1); *Brown* v. *Oakshott* (2); *In re Bartlett* (3); *Duke of Beaufort* v. *Neeld* (4); *Stone* v. *Godfrey* (5); *Kennedy* v. *Panama, &c., Mail Company* (6).]

Wylie K.C. and *Pringle*, for the plaintiff:—

We submit that the facts of this case speak for themselves. The error was a material one, which must be taken to have operated on the minds of those who contemplated purchasing the property. The auctioneer was not an agent of the plaintiff, who alone is interested in the proceeds of the sale. He was an officer of the Court, appointed by the Court, and with no power to conclude the sale. He could only report to the Court; and when there was a miscarriage, the Court must have power to refuse to sanction the sale. The Lord Chief Baron in this Court in *Woods* v. *Brown* (1) clearly states that sect. 7 of the Act of 1867 only applies to cases of re-opening biddings on the ground of under-value, and that the ordinary jurisdiction of the Court of Chancery remains otherwise unaffected. This is not a case of re-opening biddings at all, and we submit sect. 7 does not apply. In any case, there was improper conduct in the management of the sale within the meaning of sect. 7.

Megaw, for the defendants, referred to *Manser* v. *Back* (7); *Leslie* v. *Tompson* (8); *Webster* v. *Cecil* (9); *In re Hare & O'More's Contract* (10); and *Lee* v. *Rayson* (11).

R. E. Osborne K.C., for William Doherty.

SIR IGNATIUS J. O'BRIEN C.:—

Although this case has been argued with learning and ability by the appellant's counsel, we have formed a clear opinion that the appeal must be dismissed, and we do not propose to reserve our judgment. The question raised by the appeal is one of

(1) [1915] 1 I. R. 29.
(2) 38 L. J. Ch. 717.
(3) 16 Ch. D. 561.
(4) 12 Cl. & Finn, 248.
(5) 5 De G., M'N. & G. 76.
(6) L. R. 2 Q. B. 580.
(7) 6 Hare, 443.
(8) 9 Hare, 268.
(9) 30 Beav. 62.
(10) [1901] 1 Ch. 93.
(11) W. N. March 10, 1917, 86.

considerable importance, and does not appear to have been the subject of any net decision by a Court of Appeal, either in England or in this country. The facts are striking and uncontroverted. The respondent was an incumbrancer on certain property, which consisted of brick works, certain houses, and a large quantity of agricultural lands in Co. Donegal. She invoked the aid of the Court in this action, and placed her interests under its protection in absolute confidence that the Court would scrupulously ensure that the property would be realised at its full and fair market price, and that she would not be a loser through any error committed by an officer of the Court. The plaintiff had not carriage of the sale, which was entrusted to the hands of the defendants in the action. Conditions of sale were settled in Chambers, and an auctioneer was appointed to sell the property, who alone of those present at the sale knew, or was entitled to know, the amount of the reserve price fixed by the Court.

There were several persons present at the sale, but only three made bids. The first was a Mr. Elliott, the solicitor for the plaintiff, whose function it was to start the biddings. Before the biddings commenced he asked the auctioneer a plain and important question, the answer to which must have materially affected the ensuing bids, namely, what amount was brought in by certain conacre lettings. It appears that considerable portions of the property had at the date of the auction been let in conacre. These lettings had not, at the time of the preparation of the conditions of sale, been actually made, and, accordingly, the conditions of sale, although they referred to the proposed lettings, and stated that the purchaser would be entitled to receive the resulting rents, were necessarily silent as to the amount of these rents. If the figures had been known when the conditions were prepared, and had been stated in the particulars, no one could suggest that the amount of the lettings would not have constituted a very material matter affecting the price that would be given by bidders at the auction. As the figures were not contained in the particulars, Mr. Elliott, as I have said, asked what were the actual lettings at the time of the auction, and the auctioneer then stated that they amounted, not to the true figures of £332 12*s.* 1*d.*, but to £146 6*s.* 9*d.* This statement of the

Appeal. 1917.

In re Longvale Brick and Lime Works.

Sir Ignatius J. O'Brien C.

auctioneer, who purported to read the figures from a detailed account of the lettings contained in the book before him at the time, was accepted by Mr. Elliott and the other bidders. If the auctioneer had ascertained at any time before the hammer fell that a blunder had been made, and that the value of the property had been seriously misrepresented, he would, assuming he knew his duty to the Court, have corrected his error, and the bidding would have proceeded upon a proper basis. He did not, however, do so, and the mistake, which arose from the auctioneer not having turned over a second page of the book, where particulars of further lettings were contained, remained uncorrected.

Two days after the sale it was brought to the notice of the plaintiff that another bidder, named Doherty, who had offered £4260 at the sale, was then willing, the true facts having become known, to advance his bidding to £5000. That this was not a fanciful but a bona fide offer is shown by Doherty's willingness to bind himself to bid this figure at a new sale, and by the production of his cheque for £5000, the payment of which is guaranteed.

The plaintiff, who had had no control over the sale, and who relied on the Court seeing to it that her property would not be sacrificed, brought the matter of the new offer to the knowledge of the solicitor having carriage of the matter, who then applied for directions to the Court. The Court was then faced by the facts I have mentioned. The auctioneer was not the agent of the plaintiff, who had no remedy against him for the loss sustained. No action could lie against the solicitor having carriage, who was in no way guilty of any negligence. There was no fund available for the compensation of the plaintiff, and it is clear that, if the Master of the Rolls had not made the order he did, the plaintiff would have been at the loss of at least £700.

The appellants' counsel contended that the Court had no option but to compel the plaintiff, admittedly an innocent person, to bear this loss, and it is said that this results from sect. 7 of the Sale of Land by Auction Act, 1867. [His Lordship read sect. 7 and continued.] The contention is that because the reserve price was reached, as it admittedly was, and because there was no element of fraud, or of anything in the nature of fraud, in the sale, the

purchaser is entitled to hold his bargain, and the Court is bound to inflict on the plaintiff, who had entrusted her interests to the protection of the Court, what to any ordinary person would appear to be a grave wrong. The decision of Malins V.-C. in *Delves* v. *Delves* (1) has been relied on as an authority for this proposition. Now, the learned judge who decided that case undoubtedly suggests that the improper conduct in the management of the sale, referred to in sect. 7, must be something in the nature of or bordering on fraud. He says:—"I cannot help thinking that improper conduct for this purpose must mean something which, although not fraudulent, borders upon fraud. It must imply a contrivance by some of the parties by which the property has been improperly sold." I find some difficulty in reconciling this dictum with the words following. He adds: "There may be improper conduct which does not amount actually to fraud, yet is in that direction; something that cannot be approved of in the course of the sale"; and at the close of his judgment he says: "Therefore, being satisfied that the fair market-value was fixed . . . and being also satisfied that the auction was fairly conducted on the part of everybody, I dismiss the summons." If, as in the present case, something had occurred in the course of the sale which could not be approved of, although it did not amount to fraud, if the sale had not been fairly conducted on the part of everybody, I do not think the learned judge meant to hold that the sale must, notwithstanding this, be confirmed, because there was no fraud or contrivance. If he did so mean to hold, I respectfully say I cannot follow his decision. I must absolutely decline to consider any distinctions fanciful, as they appear to me, between fraud, and something bordering on fraud. If conduct is fraudulent, whether it be an act of omission or commission, then there is fraud; if it be not fraudulent, there is no fraud. Taking the words of the section itself, it appears to me that when the Legislature first excepted from the purview of the section cases of fraud, and then cases of improper conduct in the management of a sale, it meant by the words of the second exception to deal with cases where there may not have been fraud, but where there was improper conduct in the management of the sale, and I find it

(1) L. R. 20 Eq. 77.

Appeal. 1917.

In re Longvale Brick and Lime Works,

Sir Ignatius J. O'Brien C.

difficult to conceive of more improper conduct, in the absence of fraud, than for an auctioneer to make this grave misstatement affecting the value of the property offered for sale.

Griffiths v. *Jones* (1) was also relied on by the appellants. This case, however, did not arise under the Act of 1867 at all; it was merely an application to compel the purchaser to pay more than he considered he was bound to do, and it was made after the date of the certificate, so that the provisions of sect. 7 could in no event have applied. The decision of James L.J. has, in my judgment, no application to the present case. I do not, however, base my judgment solely on the fact that there was in the management of this sale what amounted to improper conduct within the meaning of sect. 7 of the Act of 1867. In the case of *Woods* v. *Brown* (2) that came before this Court, the Lord Chief Baron at p. 36 said:—"Now we are asked to set aside this sale. I admit that 30 & 31 Vict. c. 48 only affects the Court of Equity opening biddings on the ground of under-value. All other objections to sales continue notwithstanding the Act," and after citing sect. 7 of the Act of 1867, he adds: "That undoubtedly excepts the case of fraud or improper conduct in the management of the sale, but here I cannot say that there was either fraud or improper conduct . . ."

This statement of the Lord Chief Baron as to the limited operation of this statute, authoritative as all his statements necessarily are, bears added weight, having regard to his experience of the practice of Courts of Equity prior to the Act of 1867—a practice which is exhaustively dealt with in Lord St. Leonard's work on Vendors and Purchasers. It appears that in those days if, prior to the confirmation of the report, a real advance in price was offered over and above the highest bid procured, the biddings would be re-opened by the Court. That practice of re-opening biddings on the question of value only was undoubtedly in many cases a hardship on an innocent purchaser who had bid up to or beyond the reserve price; and, as pointed out in several of the cases dealing with this subject, it had a prejudicial effect on Court sales, and discouraged purchasers. This was the mischief aimed at by the statute, and this former practice, when the conditions of

(1) L. R. 15 Eq. 279. (2) [1915] 1 I. R. 29.

the section are fulfilled, is now effectually put an end to. The statute does not, however, in my judgment, affect the general jurisdiction of a Court of Equity to refuse, on proper grounds, to sanction the completion of a sale which has taken place under its control. Circumstances might arise such that, if the sale were one out of Court, specific performance would not be decreed by a Court of Equity, or one of the parties would be entitled to rescind. Are the hands of the Court to be tied in such a case? Further, if the Court which is carrying out the sale by one of its own officers does something inflicting a grievous wrong on a litigant who has invoked the aid of the Court, can it be said that the jurisdiction of the Court to remedy that wrong, or to prevent its consequences, is ousted by this statute so long as the sale is under the control of the Court, and requires an act of confirmation by the Court before it is completed. In the present case the chief clerk has not even issued his certificate confirming the sale; and it is impossible, in my judgment, to hold that the Court is bound to direct the issue of that certificate, knowing as it does that a serious wrong will thereby be inflicted on the plaintiff in the action. The Act of 1867 was never intended to have, and, in my opinion, has not, any application to such a case; and although the order of the Master of the Rolls in form directs the biddings to be re-opened, the substance of the order is far from involving the mischief aimed at by the Act.

It has been suggested that the error was not the error of an officer of the Court, but of an agent either of the plaintiff or of the defendants having carriage. I do not agree in this. At one period of our law all sales of land directed by the Court of Chancery in Ireland took place before the Master of the Court. If he had made an error of this nature in the course of a sale, and if the Act of 1867 had then been in operation, could it be seriously contended that the error was not one of an officer of the Court, which the Court had jurisdiction to remedy? At a later period, under the Incumbered Estates Court Act, these sales were transferred to the judges of that Court, and the sales took place in open Court before the judge himself, just as in the case of a sale before the Land Judge at the present time. Even now, a sale directed by a Chancery judge could take place in Court before himself. The practice has, however, grown up

Appeal. 1917.

In re Longvale Brick and Lime Works.

Sir Ignatius J. O'Brien C.

of the judge sending the sale to be conducted in the country by an auctioneer appointed by the Court. He, however, has no power of closing the sale; his duty is to report to the Court the result of the biddings, and there is no concluded contract for the sale of the property until the sale is confirmed by the Court. In this case the mistake was, in my judgment, a mistake of an officer of the Court, acting as such; and when that mistake is brought to the knowledge of the Court, the consequences of that mistake can be avoided, and the matter rectified in the manner provided for by this order. I think that the Court is bound ex debito justitiae to make the order. For these reasons, I am of opinion that the appeal should be dismissed.

Ronan L.J. referred to the evidence, and continued:—

I asked Mr. Leech during the argument was this a properly conducted sale, and he replied it was. I cannot agree. I think that improper conduct in the management of a sale means conduct in such management that was not proper, and I consider that these words aptly describe what occurred in this case. Mr. Leech, however, has contended that the Court is powerless; that the statute was passed for the benefit of purchasers; and that even where in a case like the present the purchaser succeeds in buying property, owing to a grave error in the conduct of the sale, at an under-value, he can insist on holding his bargain, unless there has been actual fraud, or something in the nature of fraud.

The question in the case is whether the Master of the Rolls was bound to confirm this sale. He was of opinion that he was not bound to do so. The conduct of the sale was in the hands of the auctioneer. In the course of the sale he made a representation to intending purchasers, false in fact, which amounted to a serious misrepresentation of the value of the property. The natural consequence of this was to diminish materially the amounts that would be offered for the property. The Court and the auctioneer in such a case as this owed a duty to the persons interested in the purchase-money as well as to purchasers. The duty of the auctioneer was to carry out a properly conducted sale. The duty of the Court was to see that such a sale was carried out.

In my opinion it was the duty of the Master of the Rolls not to confirm the sale if he thought it had not been properly conducted. He came to this conclusion in fact. In my opinion there was ample ground for his doing so, and I should have arrived at the same conclusion myself.

Apart from the Act 30 & 31 Vict. c. 48, this would dispose of the case. I respectfully adopt the statement of the law by the Lord Chief Baron quoted in the judgment of the Lord Chancellor. In my opinion the prohibition in the Act against opening biddings only applies where there has been a properly conducted sale. The Court is not required to confirm a sale which the judge thinks has not been properly conducted.

I cannot agree in the proposition suggested by Malins V.-C. in *Delves* v. *Delves* (2) that improper conduct, in sect. 7, means something bordering on fraud. Every portion of the section must be given effect to, and the words commencing with the disjunctive "or" cannot be eliminated. The owner of the property sold is, in my judgment, afforded a treble protection by the section; the reserve price must be reached; there must be absence of fraud, and of improper conduct in the management of the sale; otherwise the section does not apply. I find it difficult to conceive a graver impropriety in the conduct of a sale than what occurred here. For these reasons I am of opinion that the decision of the Master of the Rolls was right, and should be affirmed.

MOLONY L.J.:—

I agree. I am satisfied that under the general jurisdiction of the Court the learned Master of the Rolls had power to make the order he did, and that it was a right order. I am also satisfied that the grave error which occurred amounted to improper conduct in the management of the sale, and that if section 7 of the Act of 1867 otherwise had any application to the case, the order can be supported on this ground.

Solicitors for the appellants: *Caldwell & Robinson.*
Solicitor for the plaintiff: *Thomas Elliott.*
Solicitor for the defendants; *David Wilson.*
Solicitors for Wm. Doherty: *Elliott & Clark.*

R. ST. J. C.

(1) [1915] 1 I. R. 29.

(2) L. R. 20 Eq. 77.

Barton J.
1917.
Jan. 17.
April 20.

JACKSON *v.* THE ATTORNEY-GENERAL.
(1916. No. 956.)

Will—Construction—Gift to Charity—"Presbyterian Missions and Orphans"—Validity of Gift.

By her will a testatrix gave her residuary estate to "Presbyterian missions and Orphans, and to A. S. £20."

Held, that the gift to "Presbyterian missions and orphans" was a good charitable gift.

ORIGINATING SUMMONS.

By her will dated September 6th, 1915, Kate Brooks, having appointed Dr. Jackson, of 84, Ranelagh Road, Ranelagh, in the County of Dublin, executor, directed him to pay all debts, funeral, and testamentary expenses, and bequeathed to him a legacy of £40. She directed him "to sell shares in companies that I may have, and all my real and personal property of what nature and kind soever I may possess; to Mrs. Hope, 114, Halkin Street, Leicester, £30; to her father, £100; to her mother, £50; to all her sisters and brothers, £10 each. What is over to Presbyterian missions and orphans, and to Annie Smyth, £20, Phibsboro' Road, Dublin."

The testatrix died on 24th March, 1916, without having altered or revoked her will, probate whereof was granted on 10th May, 1916.

From the affidavit grounding the application it appeared that the General Assembly of the Irish Presbyterian Church supported Home, Irish, Foreign, Colonial, and Continental Missions, and also a Mission for weak congregations, and that the defendant, the Rev. W. J. Lowe, D.D., was the general secretary in Ireland for all these various missions. A society was in existence for the benefit of orphan members of the Presbyterian Church, known as the Presbyterian Orphan Society, which was an incorporated body, also controlled by a board of governors, who were defendants in the matter.

The testatrix had formerly been a member of the Rathgar Presbyterian Congregation. The deceased had not during her lifetime supported any particular charities. The defendant Thomas Brooks was the eldest brother and one of the next-of-kin of the deceased. The defendant Charles James Brooks was the only other next-of-kin.

On 18th December, 1916, the executor, Dr. Jackson, issued a summons for the determination of the following questions:—

1. Is the bequest in the will of "what is over to Presbyterian Missions and Orphans" void for uncertainty?

2. If not, has the executor power of selection as to what Presbyterian missions and orphans are entitled to the residue?

3. If the executor has no power of selection, what Presbyterian missions and orphans are entitled to the residue, and in what proportions?

S. Hayes, for the plaintiff.

Oulton K.C., for the defendant Thomas Brooks, claiming as one of the next-of-kin:—

The word "mission" does not of itself import charity. It is frequently used to denote a body of persons constituted to conduct negotiations for the purpose of establishing political or commercial relations: see "New English Dictionary." The addition of the adjective "Presbyterian" is not sufficient to introduce the element of charity.

In *MacLaughlin* v. *Campbell* (1) the bequest was to trustees "for such Roman Catholic purposes in the said parish of Coleraine or elsewhere as they may deem fit and proper. The bequest was held void by the Court of Appeal on the ground that the words "Roman Catholic" have no more restrictive effect than that of describing a particular religious denomination, and that the same interpretation must be given to words such as "Protestant," "Presbyterian," &c.; and that it would revolutionize the law of charitable gifts if the Court should hold that the introduction of a denominational epithet necessarily made a gift charitable. In

(1) [1906] 1 I. R. 588, 594.

Barton J. 1917.

JACKSON v. ATTORNEY-GENERAL.

Scott v. *Brownrigg* (1) the bequest was "for such missionary purposes in Ireland" as trustees should think fit. This bequest was held to be void on the ground that there are many missionary purposes which are not charitable. It is submitted that in the case now before the Court the gift to missions must include missionary purposes, and therefore may include purposes not charitable. Accordingly the gift is void.

This Court held in *Dunne* v. *Duignan* (2) that a gift to "foreign missions" was a good charitable gift, but did so expressly upon the ground of a charitable context. Here there is no such context, the context being of gifts that are in no legal or equitable sense charitable.

Megaw, for the Governors of the Presbyterian Orphan Society :—

There can be no question that the gift for orphans is a charitable gift, whether a gift to missions is charitable or not. One moiety of the residue should therefore be given for relief of orphans : *Salusbury* v. *Denton* (3) ; *Hunter* v. *Attorney-General* (4).

The evidence shows that the Presbyterian Church in Ireland, of which the testatrix was a member, has an organization for the relief of poor orphans under Presbyterian control in the Presbyterian Orphan Society ; and my contention is that the one moiety of the residue of testatrix's estate should be paid over to my clients.

It has been decided, however, that the individual "missions" of the Presbyterian Church are charitable : *McDermott* v. *Anderson* (5) in which are mentioned certain of the missions which Mr. Oulton contends cannot be charitable. A gift for "Irish Church Missions" has been held charitable in *Attorney-General* v. *Becher* (6). Why should "Presbyterian missions" differ ? See also *Dunne* v. *Duignan* (2).

As between Presbyterian missions and orphans, one half should be given to each general object, and the missions mentioned should have no more than one-half of the residue between them.

(1) 9 L. R. Ir. 246.
(2) [1908] 1 I. R. 228.
(3) 3 K. & J. 529.
(4) [1899] A. C. 309, at p. 324.
(5) [1915] 1 I. R. 191.
(6) [1910] 2 I. R. 251.

James Andrews, for Rev. W. J. Lowe, D.D.:—

The use of the word "missions" necessarily imports a legal charity. The cases of *Scott* v. *Brownrigg* (1) and *MacLaughlin* v. *Campbell* (2) are clearly distinguishable from this case. In the former the words used were "missionary purposes in Ireland," which as pointed out by Sir E. Sullivan M.R., were not necessarily confined to the preaching of the Christian religion. See p. 256 of the report. In the latter case "Roman Catholic purposes" had no more restrictive effect than that of describing a particular religious denomination; and it is admitted that all religious purposes are not necessarily charitable: *per* FitzGibbon L.J., at p. 597.

The case is strengthened by the reference of testatrix to orphans as objects of the bequest. He also referred to *Attorney-General* v. *Becher* (3) and *Dunne* v. *Duignan* (4).

Cusack, for the Attorney-General.

April 20.

BARTON J.:—

The principal question for decision is whether the residuary gift in testatrix's will to "Presbyterian missions and orphans" is a valid and charitable gift.

It was held by Sir E. Sullivan M.R. in *Scott* v. *Brownrigg* (1) that a trust for "missionary purposes" is too vague and wide for the Court to carry out as a charitable trust. Where, however, there were relevant circumstances to connect the words "missionary objects" with the preaching of religion, Warrington J. held that a gift for "missionary objects" was charitable: *Re Kenny* (*Clode* v. *Andrews* (5)). That case was not cited in argument, but is, I think, a very relevant authority; and this Court came to a similar conclusion, with the aid of the context, where there was a direction to expend trust funds in "foreign missions": *Dunne* v. *Duignan* (4). It is true that a gift "for religious purposes" would be void, because there would be nothing to show that it was to be applied for teaching religious

(1) 9 L. R. Ir. 246.
(2) [1906] 1 I. R. 588.
(3) [1910] 2 I. R. 251.
(4) [1908] 1 I. R. 228.
(5) 97 L. T. R. 130.

Barton J. 1917. JACKSON v. ATTORNEY-GENERAL.

doctrine or supporting religious worship or service: *MacLaughlin v. Campbell* (1). But the words here are not "missionary purposes" or "Presbyterian purposes," but "Presbyterian missions." There may be "Presbyterian purposes" which are not religious in the charitable sense, and there may be "missionary purposes" which are not religious in the charitable sense, e.g., when connected with diplomatic or political missions. But here we have the word "missions" qualified and defined by the adjective "Presbyterian"; and it would, in my opinion, be fantastic to give any other meaning to the words "Presbyterian missions" than one which would connote religious teaching, worship, or service.

The word "orphans" presents less difficulty. We are all familiar with the orphan societies of the various churches, which under religious auspices extend educational or eleemosynary help to children who by the death of a parent or parents are placed in need of such assistance. Such an organization exists in connexion with the Presbyterian Church, and is not only a legal charity, but perhaps the most deserving of all legal charities.

I answer question 1, "No." The other question will, perhaps, be sufficiently and conveniently answered by saying that the executors of the will are justified in applying one-half of the fund to the missions mentioned in the affidavit of Mr. Lane, and one half to the institutions mentioned in the affidavit of Mr. Martin.

Solicitor for plaintiff: *Hayes & Son.*
Solicitor for Thomas Brooks: *Charles F. Mathews.*
Solicitors for Presbyterian Orphan Society: *Henry & Son.*
Solicitors for the Rev. W. J. Lowe, D.D.: *Carson & M'Dowell.*
Solicitors for the Attorney-General: *A. & J. Robinson.*

R. W. L.

(1) [1906] 1 I R. 588.

PENNEFATHER *v.* LLOYD.

(1916. No. 410.)

Barton J.
1916.
June 29.

Will—Codicil—Construction—Implied Revocation.

Where a devise in a will is clear and unambiguous, the onus is on those alleging revocation by a codicil to show that the expression of the testator's intention to revoke is equally clear and unambiguous.

Hearle v. *Hicks*, 1 Cl. & Fin. 20, and *In re Stoodley*, [1915] 2 Ch. 295, applied.

ORIGINATING SUMMONS.

By his will dated 3rd June, 1899, Daniel James Mansergh, after appointing Richard Pennefather and David William Tennant executors and trustees thereof, gave certain pecuniary legacies, and devised unto his said trustees the lands of Macroney, in the County of Cork, the lands of Cullen, in the County of Tipperary, and the lands of Ballyneety, in the County of Limerick, to hold upon the following uses and trusts, namely, to testator's wife Margaret Mansergh for her life, and after her death to the use of William Owen Lloyd and his wife Jessie Lloyd for their joint lives as joint tenants, and the life of the survivor of them, with remainder to the child or children of the said William Owen Lloyd and Jessie Lloyd, who, being a son or sons, should attain the age of twenty-one years, or, being a daughter or daughters, should attain that age or marry under that age, in such shares as the said William Owen Lloyd and Jessie Lloyd should, during their joint lives, by deed appoint, or as the survivor of them should by deed or will appoint, and in default thereof then to such children in equal shares as tenants in common; and in the event of there being only one child who should attain the age of twenty-one years, or, being a daughter, should marry under that age, then the whole to such only child, and in the event of all such children dying in the lifetime of their parents under the age of twenty-one and unmarried, then in trust for the said trustees, Richard Pennefather and Edward Pennefather, and their heirs and assigns beneficially as tenants in common. By codicil to his will, dated

Barton J. 1916.

PENNEFATHER *v.* LLOYD.

12th November, 1916, it was provided as follows:—"As there has been a good many changes in my family since this will was made, and I think that it requires certain changes which I now write. In the first place, I consider it would be most desirable to sell both the properties of Cullen, and also of Ballyneety, to the tenants, or to anyone else who may wish to buy them, and also to sell to the tenants the Macroney property, or to anyone who may give a better price. Out of the proceeds of the said sales I direct that the sum of £1000 be paid to my wife Margaret Mansergh for her sole and absolute disposal, and the remainder of the proceeds of said landed properties I direct to be paid to the children of my nephew William Owen Lloyd in equal proportions share and share alike. At present there are three children, Owen, Betty, and David. This is not to interfere in any way with my wife having the entire use of all my property for her life, and it is to be paid to each child when twenty-one years old. As David Tennant, one of my trustees has died, I hereby appoint his brother John Tennant to be my trustee and executor in his place."

Testator died 27th April, 1907, and probate of his will and codicil was granted on 8th August, 1907.

The testator's widow, Mrs. Margaret Mansergh, died on 9th November, 1915.

At the date of the hearing of this application there were four children of William Owen and Jessie Lloyd living, viz., Owen, the eldest, aged seventeen, Elizabeth, David, and Catherine.

On 29th May, 1916, the trustees issued a summons asking for the determination of the question:—"Did the codicil of above deceased (Daniel James Mansergh), dated 12th December, 1908, impliedly revoke the devise of the joint life estates to William Owen Lloyd and Jessie Lloyd in the lands of Cullen, Ballyneety, and Macroney, situate respectively in the Counties of Tipperary, Limerick, and Cork, made by the will of said Daniel James Mansergh, deceased, dated the 3rd of June, 1899?"

Mark Cooper, for the plaintiffs:—

Garrett Walker K.C., for Mr. and Mrs. Lloyd:—

The codicil does not in terms purport to touch or deal with the life estates given by the will to Mr. and Mrs. Lloyd. The testator

contemplates that they should have life estates, otherwise there would be the absurdity of creating estates for their children and having these estates hung up during the lifetime of the parents. There is no express provision in will or codicil for maintenance. The express reference to the life estate given to the wife of testator, the chief object of his bounty, was obviously made ex abundanti cautelâ to prevent any question arising as to her life estate being taken away. But the gift to the children of Mr. and Mrs. Lloyd in the will is made dependent on their surviving their parents. It is clear from the will that if they die in the lifetime of their parents they take nothing, and there is no revocation of this in the codicil. The terms of the will are clear and unambiguous, and the question is whether the codicil shows an intention to revoke the devise in the will in an equally clear and unambiguous way. That is the test: *Hearle* v. *Hicks* (1). The rule is incorrectly stated in Theobald on Wills, p. 747, 7th ed. The principle of the decision of *Hearle* v. *Hicks* (1) was adopted and followed in *In re Stoodley*, *Hooson* v. *Locock* (2).

Chadwick, for the infant children of Mr. and Mrs. Lloyd:—

The testator's intention to revoke the devise of the life estates to Mr. and Mrs. Lloyd is plain. In this respect it displaces the will. It is absolutely necessary to disturb the dispositions of the will in order to give effect to the provisions of the codicil. *Hearle* v. *Hicks* (1) and *Hooson* v. *Locock* (2) depend on special circumstances, and consequently are of little use as general authorities when applied to the particular circumstances of any other case.

There is no mention of the life estates of the parents in the codicil. The settlement made by the will is altogether altered and revoked. There is no other way of reconciling the two documents. When the testator wishes to preserve the life interest of his widow, notwithstanding the alteration made as regards her in the codicil, he expressly says so. Expressio unius exclusio alterius. The terms of the codicil alter and qualify the gift to the children, and consequently destroy the gift to the parents. The animus revocandi is present. Changes had occurred in testator's family since the execution of his will. He gives this as

(1) 1 Cl. & Fin. 20.

(2) [1915] 2 Ch. 295.

Barton J. 1916. PENNEFATHER *v.* LLOYD.

his reason for altering his will. He had it before him, and he wrote down what he desired to do. In *Hooson* v. *Locock* (1) the testator had not the will before him. That appears from the codicil itself.

The words of the codicil are not ambiguous or in any way difficult to be construed, and in unequivocal terms it makes dispositions of the property which impliedly take away the gift of the joint life estates to the parents: *Earl of Hardwicke* v. *Douglas* (2).

BARTON J.:—

In my opinion, there is nothing in the codicil which necessarily displaces the life estates given to these children's parents. The codicil substitutes, for the gift in remainder of the lands to the children, a direction as to how the proceeds of the contemplated sale of the lands are to be distributed among them. According to the contrary view, the testator was, by the codicil, creating an intestacy during the life of the parents, and was relying upon the Conveyancing Act to regulate the rights of the children in respect of maintenance. In the codicil the testator declares the intention of making changes "which I now write." This declaration strengthens the ordinary rule that, where a devise in a will is clear and unambiguous, the onus is on those alleging revocation by codicil to show that the expression of the testator's intention to revoke was equally clear and unambiguous. As regards the parents' life estates, the testator did not write in the codicil any change which is inconsistent with the clear devise of the life estate as contained in the will. The question which has been submitted to the Court must, in my opinion, be answered in the negative.

Solicitor for the plaintiffs, the executors and trustees of the will: *A. H. Morgan.*

Solicitors for Mr. and Mrs. Lloyd: *Hunter & Burland.*

Solicitor for the minor children: *H. V. Bantry White.*

R. W. L.

O'MEAGHER *v.* DALY.

Barton J.
1917.
April 17, 20.

Costs—Mortgage—Suit by puisne mortgagee to realize mortgage—Proceeds insufficient—Priority.

In the absence of special circumstances a puisne mortgagee who institutes proceedings for sale is only entitled to costs with his demand, and in the event of a deficiency is not entitled to costs in priority to earlier incumbrancers.

APPLICATION on summons that the plaintiff be declared entitled to be paid her costs of the suit, and the costs of and incidental to the proceedings before the Sub-Commission Court, properly and necessarily incurred, in priority to the incumbrances affecting the lands, as mortgagee's costs.

This was a mortgagee's suit for the realization of a mortgage of the defendant's interest in certain lands held under a judicial tenancy. The usual order was made by the Court, directing an account to be taken of what sum was due to the plaintiff on foot of the mortgage, and, in default of payment by the defendant of the amount so found, that the lands should be sold, and directing an inquiry as to the incumbrances affecting the lands, and the amounts and priorities thereof. The lands were held under a judicial tenancy, and the landlord having claimed to exercise his right of pre-emption, the true value of the lands was, under sect. 1 of the Land Law (Ireland) Act, 1881, fixed by the Land Commission at £500, which sum was insufficient to pay the incumbrancer, who was sixth in priority, leaving nothing for the plaintiff, whose mortgage was at No. 7 on the schedule of incumbrances. The incumbrancer at No. 6 was consulted as to the Land Commission proceedings, but declined to interfere or make himself liable for any costs.

S. L. Brown K.C. (with him *Devitt*), for the plaintiff:—

Every mortgagee's suit is, in Ireland, brought for the benefit of all incumbrancers. "Where a subsequent incumbrancer institutes proceedings, not in his own interest only, but to secure or to realize and distribute the mortgaged property, or to ascertain

Barton J. 1917. O'MEAGHER *v.* DALY.

the priority of the incumbrancers, he is entitled to his costs, so far as incurred for these objects, as a first charge on the funds": Halsbury, Laws of England, vol. xxi, p. 232, par. 425; *Wright* v. *Kirby* (1), followed in *Batten* v. *Dartmouth Harbour Commissioners* (2). This suit was in truth for the administration of this property for the benefit of all parties.

H. D. Conner K.C., for the incumbrancer:—

In a mortgagee's action a mortgagee gets his costs with his demand, and gets no costs if he is not reached: *Handcock* v. *Handcock* (3); Fisher, Law of Mortgage, p. 934, par. 1863. A puisne mortgagee does not sue in this Court (as he does in the Land Judge's Court) on behalf of himself and all other mortgagees. He sues on his own mortgage: *Leonard* v. *Kellett* (4); *Hilliard* v. *Moriarty* (5); *Northern Banking Co.* v. *Sloan* (6).

Cur. adv. vult.

April 20.

BARTON J.:—

The plaintiff instituted this suit by originating summons, dated November 25th, 1913, claiming a declaration of charge upon certain lands of the defendant under a deed of charge, an account of what was due under said deed of charge, and payment of the sum so ascertained, and of the costs of suit. On December 8th, 1913, the usual primary decree was made, with the addition of inquiries for incumbrances and priorities, and the plaintiff was given his costs of that order with his demand. The Chief Clerk's certificate found twelve incumbrances on the lands in question, the plaintiff's incumbrances being seventh in priority. The fifth and sixth incumbrances, which come immediately in front of plaintiff's, belong to Mr. J. Solomon. It turns out that the sum realized from the sale of the lands is only sufficient to pay the first five incumbrances in full and the sixth in part. Mr. Solomon is not paid in full in respect of the sixth incumbrance, and the plaintiff is not reached. In these circumstances, the plaintiff applies for the costs of suit in priority to all the incumbrancers;

(1) 23 Beav. 463.
(2) 45 Ch. D. 612.
(3) 1 Ir. Ch. Rep. 444.
(4) 27 L. R. Ir. 418.
(5) [1894] 1 I. R. 316.
(6) See 2 N. I. J. 54.

and his application is opposed by Mr. Solomon, upon whom the burden of the costs would fall. It becomes necessary to decide what is the practice in the Chancery Division in Ireland in a case of this kind.

Cases were cited in which a puisne mortgagee brings a suit to administer the estate of a deceased mortgagor, of which *Leonard* v. *Kellett* (1) is an example; and I was also referred to cases where, in the course of a creditor's administration suit, mortgaged premises are sold with the consent of a mortgagee, as in *Hilliard* v. *Moriarty* (2). The latter case is useful upon the question of costs of sale. It is enough to refer to a case which seems to be precisely in point: *Northern Banking Co* v. *Sloan* (3), decided by Sir Andrew Porter M.R. on the 16th December, 1901. The case is unreported; but it is noted in 2 New Irish Jurist, at p. 54, and the order itself has been produced from the Record Office.

In that case the plaintiffs, who were puisne mortgagees, applied, in circumstances similar to those in the present case, to have their costs in priority to the other incumbrancers, and their application was opposed by the Newry Loan Co., who were prior mortgagees. The Master of the Rolls' order ran as follows:—"The judge being of opinion that no special circumstances have been disclosed as would entitle the appellants to any special priority in respect of these costs doth make no rule upon so much of the aforesaid summons as deals with such question; and, accordingly, the judge doth declare the applicants, and also the Newry Loan Co., Limited, entitled to be paid their respective costs properly and necessarily incurred in these actions, down to and including this application and order (with counsel), and proceedings thereunder, in the same priority with their respective demands."

I do not entertain any doubt that the order of the Master of the Rolls correctly expresses the practice of this Court. In the present case there are no special circumstances. The plaintiff brought the action in his own interest only, expecting, and not unreasonably expecting, to realize his security. Owing to the circumstance that the landlord of premises comprised in the security has exercised his statutory right of pre-emption, the sale has

(1) 27 L. R. Ir. 418. (2) [1894] 1 I. R. 316. (3) 2 N. I. J. 54.

Barton J. 1917. O'MEAGHER v. DALY.

produced less than would otherwise have been realized, and the plaintiff's expectations have been disappointed. Mr. Solomon, the prior mortgagee, has never adopted the suit, which did him no good, but harm. He had no wish to realize his security, as he was receiving the comfortable return of 10 per cent. interest. He finds himself, as the result of the suit, without his remunerative interest, and only partially paid off. The order will follow the precedent of the *Northern Banking Co.* v. *Sloan* (1).

It is not necessary to refer to the English cases, further than to say that this order, so far as the present case is concerned, does not appear to conflict with the rule as stated in Halsbury, vol. xxi, pp. 232, 233.

Solicitors for the plaintiff: *O'Meagher & Sons.*

Solicitor for the incumbrancer: *W. G. Armstrong.*

D. M. S.

Lord Chancellor in Lunacy. 1917. June 2.

IN THE MATTER OF D, A PERSON OF UNSOUND MIND (2).

Sale of undivided Share of lunatic's land—Jurisdiction of Lord Chancellor—Lunacy Regulation (Ireland) Act, 1871, *sects.* 63, 67, 74—*Settled Land Act*, 1882, *sect.* 2, *sub-ss.* 5, 6; *sect.* 58, *sub-s.* 1; *sect.* 62.

A lunatic so found by inquisition was owner of an undivided share of lands as tenant in tail, and also of an undivided share of other lands as tenant in fee-simple.

Held, by the Lord Chancellor, that he had jurisdiction under section 63 of the Lunacy Regulation (Ireland) Act, 1871 (34 & 35 Vict. c. 22), to direct a sale of the lunatic's share in the fee-simple lands to certain of the co-owners, and under sections 58 and 62 of the Settled Land Act, 1882, to authorize the committee of the lunatic's estate on her behalf to exercise the lunatic's powers as a tenant for life under the Settled Land Acts, and to convey the share of the lunatic therein to the same persons in consideration of sums paid into Court to the credit of the matter.

D., a person of unsound mind, so found by inquisition, was entitled to one-sixth undivided share of the freehold lands of A as tenant in common in tail in possession, and was also entitled in fee-simple to one-sixth of the lands of X and Y as tenant in common with her five brothers and sisters, who were each entitled to one-sixth of the lands of A as tenants in common in tail in possession, and

(1) 2 N. I. J. 54.

(2) This case is reported by the special permission of the Lord Chancellor.

to one-sixth each of the lands of X and Y as tenants in common in fee under the settlement by which the lunatic's shares were settled.

A family arrangement was made by which two brothers of the family were to become the owners of the entire lands on payment by them to the other members of the family of the value of their respective one-sixth shares each therein. A valuation of the entire lands was made by a competent independent valuer, who valued the one-sixth share of the lunatic in the entailed lands of A at £659 1*s.* 9*d.*, and her one-sixth share in the lands of X and Y at £1076 6*s.* 10*d.* The brothers and sisters of the said D applied in the lunacy proceedings for liberty to pay into Court the two sums of £659 1*s.* 9*d.* and £1076 6*s.* 10*d.*, being the value of the one-sixth shares of the said D. The Registrar in Lunacy reported that the general solicitor for Minors and Lunatics had investigated the matter, and was of opinion that it was for the benefit of the said D, and proper that the money should be brought in as proposed, and said two sums of £659 1*s.* 9*d.* and £1076 6*s.* 10*d.* were duly paid into Court to the credit of the lunacy matter. The income available for the maintenance of the lunatic would be increased from about £86 to about £100 per annum by means of this proposed arrangement. The committee of D's estate presented a petition to the Lord Chancellor for leave to execute and enrol a disentailing assurance of the share of the said D in the lands of A, and to execute a conveyance of same together with the lands of X and Y to the other brother and sisters of the said D in consideration of the said payment. The five brothers and sisters undertook, if necessary, to forthwith execute a disentailing assurance of their shares in the said lands of A.

H. Morgan-Byrne, for the petitioner:—

Owing to the present high interest to be obtained for money, the income to be derived from the investment of the said sum of £659 1*s.* 9*d.* and £1076 6*s.* 10*d.* will be greater than the previous income of the lunatic derived from her undivided share in the lands, which is of a more precarious and uncertain kind than the interest on the money. Sect. 63 of the Lunacy Regulation (Ireland) Act, 1871, enables the Lord Chancellor, where it appears to be just and reasonable, or for the lunatic's benefit, to order any estate or interest of the lunatic in land, including an estate tail, to be sold

Lord Chancellor in Lunacy. 1917. *In re* D.

for, amongst others, the payment of or provision for the expenses of his future maintenance: *In re Pares* (1). The increase of the lunatic's income is a provision for the expenses of her future maintenance under sect. 63. Sect. 67 of the Lunacy Act protects the persons in remainder by providing that their interests in the surplus moneys arising upon any such sale are to be of the same nature as the estate sold.

Section 74 does not seem to authorize a sale to a co-owner, but only a concurrence with the others in making a sale: *In re Weld* (2); *In re Gaitskell* (3).

[THE LORD CHANCELLOR:—Sect. 67 deals with surplus moneys, and there will be no surplus moneys here, as the whole purchase money is paid into Court. The policy of the Lunacy Act is to preserve existing limitations; and if it were attempted to carry this through under the Lunacy Act, that would necessarily involve the destruction of the existing estate tail, while there is no power of re-entailing it.]

If there is no jurisdiction to sell the lunatic's share of the entailed lands of A under sect. 63, then the Lord Chancellor can order these lands to be sold under the provisions of the Settled Land Act, 1882. The several owners of the entailed lands of A being tenants in common thereof under the same settlement, together constitute the person having the powers of a tenant for life thereof under sect. 2, sub-s. 6, of the Settled Land Act, 1882. There is not any person in the present case who is beneficially entitled to possession of the settled land "for his life" (sect. 2, sub-s. 5), as all the owners are tenants in tail thereof. As, however, the other owners are about immediately to disentail their shares, the Court may treat this case as one in which there is one tenant in tail of an undivided one-sixth (viz. the lunatic) and five absolute owners in fee of the other five-sixths.

Section 58 (sub-s. 1 (*c*)) of the Settled Land Act, 1882, gives a tenant in tail when his estate or interest is in possession the powers of a tenant for life, and consequently the lunatic under this section as tenant in tail of the one-sixth share of lands of A has the powers of a tenant for life. Section 62, where a person having the powers of a tenant for life is a lunatic so found by

(1) 12 Ch. D. 333. (2) 28 Ch. D. 514. (3) 40 Ch. D. 416.

inquisition, enables the committee of his estate, in his name and on his behalf, under an order of the Lord Chancellor to exercise the powers of a tenant for life.

Pigot K.C., for the general solicitor for lunatics :—

Where the brothers and sisters of the lunatic execute a disentailing assurance of their shares and become owners in fee, I agree that the present case will be outside the operation of sect. 2 (sub-s. 6) of the Settled Land Act, and the lunatic as the tenant in tail of her one-sixth of the lands of A can sell this share with the sanction of the Lord Chancellor under the provisions of sects. 58 and 62. If your Lordship is satisfied that the sale is for the lunatic's benefit, and to provide for the payment of or provision for the expenses of her future maintenance, the sale of the lunatic's share of the lands of X and Y can, I submit, be carried out by operation of sect. 63 of the Lunacy Act.

THE LORD CHANCELLOR :—

I am of opinion that an increase in the income of the lunatic from about £86 to £100 per annum is beneficial to her for the purpose of her future maintenance, and I have jurisdiction under sect. 63 of the Lunacy Act to direct—and I do direct—the lands of X and Y to be sold under that section. As soon as the other co-owners of the entailed lands of A duly disentail their shares the lunatic will be the sole owner of one-sixth of these lands as tenant in tail, and her committee can on her behalf exercise the powers of a tenant for life under sect. 58 (sub-s. 1) of the Settled Land Act, 1882. By this means the subsisting trusts now affecting the settled lands will attach to the capital moneys resulting from such sale, until they can be paid over to a person absolutely entitled.

The proposed family arrangement can, therefore, be carried out by the joint operation of sect. 63 of the Lunacy Act and sects. 58 and 62 of the Settled Land Act of 1882; and I give liberty to the committee to proceed under the Settled Land Act to carry out the sale of the entailed lands, and to convey the other lands under sect. 63.

Before this order is made up, the disentailing assurance by the brothers and sisters must be produced to the Registrar.

Solicitors for the committee: *W. Mooney & Son.*

General Solicitor for Lunatics and Minors: *Sir A. Baker.*

Ross J.
1917.

May 14, 15, 16.
June 5.

M'MEEKIN *v.* STEVENSON.

(1917. No. 167.)

Statute of Frauds — Sale of Lands — Memorandum in writing—Entry in Auctioneer's Book—Conditions of Sale—Signature by Auctioneer on Day after Sale—Auctioneer's Authority as Vendor's Agent.

On a sale of lands by public auction, the note in the auctioneer's book contained particulars taken from the conditions of sale, the biddings, a statement that the lands were sold to the plaintiff for £2100, and the auctioneer's signature. The particulars were filled in before the sale; the rest of the note on the following morning.

Held, that the auctioneer's note sufficiently referred to the conditions of sale to constitute with the latter a good memorandum within the Statute of Frauds.

Held also, that the authority of an auctioneer as agent for a vendor is of a more permanent character than his authority as agent for a purchaser—the test being, was the memorandum in substance made at the time and as part of the transaction of sale?

TRIAL OF ACTION.

The action was brought to enforce specific performance of an agreement made on January 1st, 1917, for the sale of a freehold farm in Co. Antrim, containing about 60 acres, subject to a Land Commission annuity of £31 15*s.* 0*d.* The defendant denied the agreement, and relied on the Statute of Frauds.

The facts, in so far as they are material to the present report, are as follows:—

The farm was put up for sale by auction on January 1st, 1917, and was eventually knocked down to the plaintiff for the sum of £2100. The plaintiff signed the acknowledgment attached to the conditions of sale, and paid £100 by way of deposit. Prior to the sale the auctioneer, Mr. McClelland, entered the following particulars (taken from the conditions of sale) in his book:—"John Stevenson—1st January, 1917. 60A. 2R. 16P. Annuity, £31 15*s.* 0*d.* Complete on 1st February, 1917, payments to 1st November. Conveyance from Rev. Robert Wallace and others. No search."

On the morning after the sale he added the biddings, and signed his name as follows :—

"Mr. Dickson,	1500	1700	1825	1875
	1925	1975	2025	2075
"George McMeekin,	1600	1800	1850	1900
	1950	2000	2050	2100

"Sold to George McMeekin for £2100.

"John A. McClelland."

Mr. Bigger, defendant's solicitor, signed the conditions of sale on January 30th, 1917.

Herbert Wilson K.C. (with him *Denis Henry K.C.*, and *H. M. Thompson*), for the defendant:—

There is here no sufficient memorandum to satisfy sect. 4 of the Statute of Frauds. There is no reference to the conditions of sale in the auctioneer's note. The law on this point is succinctly stated at p. 9 of Williams' Vendor and Purchaser, 2nd ed. :— "If one wrote a letter saying, 'I accept your offer,' there is no doubt that this may be shown by parol evidence to refer to another letter previously received, in which the terms of the offer are fully stated, so that a complete contract in writing may be established by the two letters read together. Similarly, parol evidence has been admitted to connect a letter addressed 'Dear Sir' only with the envelope in which it was enclosed, and on which the purchaser's name was written. On the other hand, memoranda of sales written in auctioneers' books in terms which needed no explanation have been held insufficient to satisfy the statute, on the ground that they contained no reference to special conditions on which the sales were made."

[Ross J.:—If there had been no conditions of sale, and the auctioneer had signed contemporaneously with the sale, you would be bound?]

Yes. The law as to the incorporation of several documents is best stated in *Long* v. *Millar* (1). See also the judgment of Lord Ellenborough C.J., in *Hinde* v. *Whitehouse* (2), and the cases referred to in Blackburn's Contract of Sale (3rd ed.), p. 49, et seq.

(1) 4 C. P. D. 450.

(2) 7 East, 558, at pp. 569 and 570.

Ross J. 1917. M'MEEKIN v. STEVENSON.

[Ross J.:—If the conditions of sale had been subsequently abandoned, would not the auctioneer's note have been sufficient?]

Unquestionably, but there is no evidence of any abandonment. The note in the auctioneer's book does not contain all the conditions of sale. It is not complete, therefore it is not a good memorandum. *Shardlow* v. *Cotterell* (1) is not in point; in that case the memorandum was written on the conditions of sale. He also referred to *Kenworthy* v. *Schofield* (2); *Pierce* v. *Corf* (3); *Rishton* v. *Whatmore* (4); *Crane* v. *Naughten* (5).

McGonigal K.C. (with him *S. L. Brown K.C.* and *Andrews*), for the plaintiff:—

The auctioneer's note sufficiently refers to the conditions of sale to incorporate them. *Shardlow* v. *Cotterell* (1) is an authority in plaintiff's favour; the words "sold to George McMeekin for £2100" brings him within that case. There the word "purchased" was held to refer back to and to identify a previous agreement. The word "sold" in the present case has a precisely similar effect. See the judgment of Kay J., in 18 Ch. D., at pp. 286 and 287, on the trial of the action of *Shardlow* v. *Cotterell* (1).

Cur. adv. vult.

His Lordship, having found as a fact that the defendant agreed to a sale of the farm, proceeded to deal with the portion of the defence in which the Statute of Frauds was pleaded.

June 5.

Ross J.:—

There remains only the question of law, is there a sufficient memorandum within the meaning of the Statute of Frauds, signed by the party chargeable or his authorized agent?

As the decisions are many in number, for the sake of lucidity it is well to go back to the Statute itself. The 4th sect. of the Statute provides that no action shall be brought upon any contract or sale of lands, or any interest in or concerning them, unless the agreement on which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed as therein mentioned.

(1) 20 Ch. D. 90.
(2) 2 B. & C. 945.
(3) 9 Q. B. 210.
(4) 8 Ch. D. 467.
(5) [1912] 2 I. R. 318.

Here let me cite the words of Gibson J. in *Crane* v. *Naughton* (1): "When parties to a contract reduce it to writing, nothing can be added to or taken from the writing; it speaks for itself, and is final and conclusive. But the document required by the Statute of Frauds is of a different character. It is a memorandum of what the contract is. Accordingly if the memorandum is not in accordance with the true contract, it is a bad memorandum."

The auctioneer represented himself as selling a farm, subject to the conditions of sale read out by him on the occasion. The acknowledgment signed by the purchaser is attached to the conditions of sale. If Mr. Bigger had authority to sign also, there would be no question. I will assume that Mr. Bigger's authority to sign, at the time he actually signed, was revoked. On this assumption was there a sufficient memorandum? It is settled law that the memorandum need not appear in one document. It may be contained in one or more, but in such circumstances certain requirements are essential. Now, what is the principle? We find it laid down in the words of Lord Denman C.J. in *Dobell* v. *Hutchinson* (2): "On examination it will be found that they (i.e. the cases) establish this principle, that where a contract in writing or note exists, which binds one party, any subsequent note in writing signed by the other is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any writing which contains them." Again, take the words of Lord Cranworth L.C. in *Ridgway* v. *Wharton* (3):—"The authorities lead to this conclusion, that if there is an agreement to do something, not expressed on the face of the agreement signed, that something that is to be done being included in some other writing, parol evidence may be admitted to show what that writing is, so that the two taken together may constitute a binding agreement within the Statute of Frauds."

The meaning of this further appears in *Long* v. *Millar* (4), where Thesiger L.J. says:—"When it is proposed to prove the existence of a contract by several documents, it must appear upon

(1) [1912] 2 I. R. 318, at p. 324.
(2) 3 A. & E. 355, at p. 371.
(3) 6 H. L. C. 238, at p. 257.
(4) 4 C. P. D. 450, at p. 456.

Ross J.
1917.

M'MEEKIN
v.
STEVENSON.

the face of the instrument signed by the party to be charged that reference is made to another document; and this omission cannot be supplied by verbal evidence. If, however, it appears from the instrument itself that another document is referred to, that document may be identified by verbal evidence." The second document must be referential. We must now consider what will amount to a reference on the face of the document that will let in parol evidence to show what the document is, and that there is no other document containing different terms. The referential words need not with precision refer to the document first signed; they need not in express terms state that there is a document at all. If the words support the inference that another document exists, that other document can be identified by parol evidence.

In *Long* v. *Millar* (1) the word "purchase" was held sufficiently referential. Bramwell L.J. says, at p. 454:—"The receipt uses also the word 'purchase,' which must mean an agreement to purchase, and it becomes apparent that the agreement alluded to is the agreement signed by the plaintiff, so soon as the two documents are placed side by side." This is explained by Kay J. in *Shardlow* v. *Cotterell* (2):—"They (i.e. the Court) thought the word 'purchase' implied an agreement, and the Court felt at liberty to refer to another document containing the agreement, and parol evidence was admitted to identify the document, and to show that it was the only document which contained any such agreement." The Court of Appeal (3) concurred in this part of the judgment of Kay J. Jessell M.R., at p. 92, says:—"It was held by the learned judge in the Court below, and I think rightly held, that having regard to the word 'purchased' in the receipt there was sufficient connexion between the two documents to allow them to be read together as saying what was sold."

Applying these principles to the present case, the question is, Does the memorandum in the auctioneer's book sufficiently incorporate the conditions of sale and the acknowledgment signed by the plaintiff? In the conditions of sale the farm is fully described. The following particulars are given:—The name of the owner, John Stevenson; the quantity of land; the Land Commission annuity; the place of the proposed auction; the date of sale,

(1) 4 C. P. D. 450. (2) 18 Ch. D. 280, at p. 287. (3) 20 Ch. D. 90.

1st January, 1917; the root of title, i.e. an assignment from Rev. Robert Wallace and others to the vendor; the date to which outgoings are to be paid by the vendor; the date for completion. The acknowledgment attached to the conditions of sale shows that the sale took place on the 1st January, 1917, and that the plaintiff was the highest bidder at the price of £2100. Now, alongside this document we place the extract from the auctioneer's book. We find the name of the owner, John Stevenson; the date of the sale, 1st January; the date of completion, 1st February, 1917; payments, (i.e., outgoings) to 1st November, 1917; conveyance from Rev. Robert Wallace and others, i.e. root of title. Then follow the biddings in which George M'Meekin appears the highest bidder for £2100.

Then the memorandum concludes:—"Sold to George M'Meekin for £2100. John A. M'Clelland." Here we have unmistakable internal references in the auctioneer's book to the conditions of sale. Moreover, we have the word "sold," which is quite as referential as the word "purchased," relied on in the cases I have mentioned. The word "sale" is the correlative of the word "purchase." There cannot be a sale without a purchase, and there cannot be a purchase without a sale. The one is implied in the other—the words are reciprocal. I am therefore of opinion that, assuming the auctioneer to have had authority as agent for the vendor, there is a good memorandum in writing to satisfy the Statute of Frauds. All the cases relied on for the defendant are distinguishable. In *Hinde* v. *Whitehouse* (1) there is nothing in the document containing conditions of sale to show that it related to the catalogue. The two documents are distinct, and no inference could properly be drawn that they related to the same sale. In *Rishton* v. *Whatmore* (2) there are no referential words in the entry in the auctioneer's book that could be held to incorporate the conditions of sale. In *Peirce* v. *Corf* (3), the catalogue and the conditions of sale are not sufficiently connected to warrant a sound inference that they relate to each other.

I now come to the defendant's last point. The auctioneer M'Clelland signed his book the next morning and not on the day

(1) 7 East, 558. (2) 8 Ch. D. 467. (3) L. R. 9 Q. B. 210.

Ross J. 1917.

M'MEEKIN v. STEVENSON.

of the sale. Is this fatal to the plaintiff's case? Was the auctioneer's agency terminated on the day of the auction?

The auctioneer is the agent for both the vendor and the purchaser. The authority of the vendor is given when he appoints the auctioneer to conduct the sale. In the case of the purchaser, the agency is conferred by the acceptance of his bidding, which is considered to imply an offer of such authority.

I think from the very nature of the case the authority of the auctioneer as agent for the vendor is of a more permanent character than his authority as agent for the purchaser. There is some support for this proposition in the words of Pollock C.B., in *Mews* v. *Carr* (1):—"No doubt an auctioneer at the sale is agent for both seller and buyer, so as to bind them by his signature; but the moment the sale is over, the same principle does not apply, and the auctioneer is no longer the agent of both parties, but of the seller only."

The real test is whether the memorandum was made in substance at the time and as part of the transaction of sale. The circumstances of the case must be considered, and common sense applied.

The sale of the chattels occupied a considerable time, and the auction lasted long into the winter evening. Was it reasonable to expect the auctioneer who was entrusted with the entire sale by the vendor to postpone his signature till next morning, when he had an opportunity of going through all the items to make sure that there was no mistake? In these circumstances I think his signing should be regarded as cotemporaneous and part of the transaction of sale. There is no case deciding that the signature must be made on the day of the sale. This decision does not conflict with *Bell* v. *Balls* (2), where the auctioneer signed the memorandum for the purchaser a week after the sale, at a time when the purchaser had repudiated the purchase altogether. I am, therefore, of opinion that the defendant was bound by M'Clelland's signature on the morning of 2nd January, 1917.

I shall for the reasons I have given make a decree for specific performance of the agreement. I shall also grant an inquiry at chambers as to damages for breach of, and for delay in carrying

(1) 1 H. & N. 484, at p. 488. (2) [1897] 1 Ch. 663.

out, the terms of the agreement. The defendant must pay the costs of this action when taxed. I am glad to be able to arrive at this conclusion. Assuming the defendant's case, that the sale was only a sham and merely intended to attract bidders—this is a most improper device. If this is a common practice in that part of the country, the sooner it is abandoned the better.

I cannot condemn too severely the conduct of the defendant in trying to struggle out of his contract, by falsely charging an honourable solicitor and a respectable auctioneer with a disgraceful betrayal of the interests of their client and employer.

Solicitors for plaintiff: *David M'Gonigal & Sons.*
Solicitors for defendant: *Harper & Son.*

T. C. T.

Barton J.
1916.
March 26.

In re CROTHERS' TRUSTS (No. 2).
(1914. No. 967.)

Will—Construction—Gift of income of fund to widow till re-marriage—Gift over on her death—Vesting—Period of distribution—"Then living."

A testator directed his executors to pay to his wife the income of a fund of £1000 until her re-marriage (which event happened), and then to pay her £300 out of the fund. He directed that on the widow's death the £700 residue should be divided among the eldest sons of his brother and sisters "then living and mentioned in this will."

W. was the first-born son of a sister of the testator. He died before the re-marriage of the widow. The mother of W. was mentioned by name in the will, and survived the widow.

Held, that W. took a vested interest in the sum of £700 liable to be divested if his mother had pre-deceased the widow, and, as this event had not happened, that he became entitled to a share of the fund of £700.

William Crothers by his will, dated 5th October, 1842, directed the investment of the sum of £1000 for the use of his wife, the interest of which she was to receive as long as she remained unmarried, and in the event of her re-marriage she was was to receive £300 out of this fund. The will then provided as follows :—"On the death of my wife, the money funded for her use is to be divided share and share alike, between the eldest sons of my brother and sisters then living and mentioned in this will."

The testator died before 1846 and probate of his will was granted on the 3rd March of that year. The testator's widow intermarried with Samuel Edgar on the 3rd July 1855. On the occasion of her marriage the executors paid her £300 out of the fund of £1000 as directed by the will, and subsequently for many years paid the income of the £700 residue to the brother and sisters of the testator. In 1898 the cash and securities representing the sum of £700 were paid into Court by the executrix of the surviving executor of the testator's will.

Margaret, a sister of the testator, and mentioned by name in his will, married a man called Mitchell. William Crothers Mitchell

was her first-born son. He was born in 1852 and died in 1854, before the re-marriage of the widow. The widow died in 1911. Mrs. Mitchell died in 1913.

The question of law arising for the decision of the judge came before him on a memorandum of the chief clerk, raising the question as to whether William Crothers Mitchell, who died on the 24th April, 1854, took any benefit under the will of William Crothers.

John Cusack, for the legal representative of William Crothers Mitchell when raised:—

In the events that have happened one-fourth of this fund of £700 vested in William Crothers Mitchell at his birth. That vested interest was never divested or taken out of him by reason of his own decease in 1854, because his mother, Mrs. Mitchell, survived the testator's widow. She was a sister mentioned in the will and was living at the period of distribution. It has been already decided by this Court that the words "then living" refer to the brother and sisters whose names are mentioned in the will, and not to the eldest sons. See *In re Crothers* (1). It was there decided that there was an acceleration of the subsequent interests on the re-marriage of the widow. I submit that the time for payment or distribution is postponed merely for convenience, and that the vesting under such circumstances is not to be deferred until that point of time: *Adams* v. *Robarts* (2); Jarman on Wills (6th ed.), 1404; *Adams* v. *Adams* (3).

Charles Murphy, for William John Andrews, a nephew of the testator, who was entitled to share in the fund:—

William Crothers Mitchell died in 1854 before the re-marriage of the widow, and consequently his personal representative can take no share in the residue of the fund of £1000. He was not living at the period of distribution, *i.e.*, the death of the widow in 1911. The words "eldest sons" in this will mean the sons actually living at the particular date fixed for the division of the £700. The direction to divide "share and share alike" sustains this contention. Though this boy was the first-born son of Mrs. Margaret Mitchell, he was not the eldest within the words of

(1) [1915] 1 I. R. 53. (2) 25 Beav. 658. (3) 25 Beav. 652.

Barton J. 1916.

In re CROTHERS' TRUSTS.

the will, because he died before the crucial period. No interest vested in him at birth. The words "eldest sons" do not here mean priores natu: *Madden* v. *Ikin* (1). It is a question of intention. There is an explanatory context here, showing that the testator did not mean the eldest son—the primogenitus; but the son who should actually be the eldest son when the widow died: *Bathurst* v. *Errington* (2). See also *Livesey* v. *Livesey* (3); *Sheridan* v. *O'Reilly* (4); *Meredith* v. *Treffory* (5). *Adams* v. *Robarts* (6) is distinguishable. *Adams* v. *Adams* (7) lays down the somewhat self-evident proposition, that the character of "eldest son" is in ordinary cases to be ascertained at the period of vesting.

Ellison, for Bella Wallace, appointed by the Court to represent the next-of-kin of the brother and sisters of the testator mentioned in the will.

March 27.

BARTON J.:—

The question for decision is, whether William Crothers Mitchell took any benefit under the will of his uncle, William Crothers.

The testator directed his executors to pay to his wife the income of a fund of £1000 so long as she remained unmarried, and on her re-marriage to pay her £300 out of the fund, and on the widow's death directed the money funded for her use to be divided among the eldest sons of the testator's brother and sisters then living and mentioned in the will.

William Crothers Mitchell was the child of Margaret Crothers, a sister of testator, who married a man named Mitchell. William Crothers Mitchell was her first-born son. He was born after the testator's death. He died before the re-marriage of the widow. His mother, Mrs. Margaret Mitchell, was living at the death of the widow.

The question is whether William Crothers Mitchell took a vested interest at his birth liable to be divested if his mother

(1) 2 Dr. & Sm. 207.
(2) 2 App. Cas. 698.
(3) 2 H. L. 419.
(4) [1900] 1 I. R. 386, 402.
(5) 12 Ch. Div. 170.
(6) 25 Beav. 658.
(7) 25 Beav. 652.

predeceased the widow, or whether he took nothing unless he was living at the date of the death of the widow.

The words "then living" would settle the question if they applied to the words "eldest sons." But I have already held that they must grammatically be applied to the words "brother and sisters," because they are coupled with the words "and mentioned in the will." The eldest sons are not elsewhere mentioned, and the brothers and sisters are mentioned by name in the will. The testator may have intended the words "then living" to apply to the words "eldest sons." But I cannot give that meaning to the words which he has used. That being so, the words "then living" are rather in favour of the claim of the child, because it is expressly prescribed that his parent should be then living; and it is not required that her eldest son should be then living.

The only other words upon which stress was laid in the argument were the words "to be divided share and share alike." Upon this point I have been referred to the case of *Adams* v. *Robarts* (1), where there was a trust of stock for *A* for life, "and after her decease to be divided equally between her younger children"; and it was held, first, that the children took vested interests at their births; and, secondly, that the character of "younger child" was to be determined at the period of vesting and not that of distribution. At p. 661 Sir J. Romilly made the following observations on the distinction in regard to vesting, between a direction to divide amongst a class at once and such a direction following a gift of a tenancy for life. He says:—"There is no doubt that when there is no gift except in the direction to divide, the gift takes effect at the period of division, and the class is then to be ascertained; but if there be a previous life estate, and the division is postponed merely for the convenience of the estate, the case is otherwise." That is the present case, for it is obvious that the division is only postponed for the convenience of the estate. Sir J. Romilly proceeds:—"Supposing this stock had been given without any life estate, by a simple direction to divide it between the children at twenty-five, those only who attained that age could take; but when it is given to one for life, and afterwards to be divided between his children, they who survived the testator would all take."

(1) 25 B. 658.

Barton J.
1916.

In re CROTHERS' TRUSTS.

Mr. Murphy relied upon *Madden* v. *Ikin* (1), where a testator gave personal property directing that upon the death of the survivor of several tenants for life it was "to be divided equally between the two eldest children born in wedlock of each of my sons and daughters"; and I understand Sir R. T. Kindersley, at p. 211, to say that if there was nothing more than that in the will, that would have meant priores natu, and would have given vested interests at birth, but he found other words in the will which showed that the testator meant the two actual eldest living sons at the date of distribution. There are no such words here. On the contrary, if I am right in construing "then living" as referring to "brother and sisters," an argument contra may be founded on the maxim, expressio unius exclusio alterius.

Mr. Murphy also referred to *Bathurst* v. *Errington* (2), but in that case the words and facts were different. Much turned on the word "become," and it was decided that a man can be said to "become" the eldest son of his father after his father's death, and that words like "surviving" and "then living" can be interpreted by a court of construction with the help of a context, but not without it. Accordingly, I am of opinion that as I must construe the words "then living" as applying grammatically to "brother and sisters" there is nothing to justify me in inserting the words "then living" again, and applying them to the eldest sons. That being so, as division was only postponed for the convenience of the estate, I am led to the conclusion that this boy took a vested interest, liable to be divested if his parent died before the widow, which did not happen. The testator may have meant the words "then living" to apply to eldest sons, but if so, he did not express himself in that sense; and I must discard any such conjecture, and must act on the grammatical meaning of the words, even although I am left with a misgiving that they, perhaps, do not represent what he may have intended.

Solicitors for William Crothers Mitchell: *R. A. Mullan & Son.*
Solicitor for William John Andrews: *J. B. Wallace.*
Solicitor for Bella Wallace: *Theodore Cronhelm.*

R. W. L.

(1) 2 Dr. & Sm. 207.

(2) 2 App. Cas. 698.

IN RE MARY GEOGHEGAN.
(FOLIO 6098. CO. LIMERICK.)

Ross J.
1917.
June 25, 29.

Land Registry—Local Registration of Title (Ireland) Act, 1891 (54 & 55 *Vict. c.* 66), *sect.* 35, *sub-s.* 1, *and sect.* 38, *sub-s.* 1—*Subdivision without Consent of Land Commission—Registration of Owner of Subdivided Portion—Prohibition of Alienation—Landlord and Tenant (Ireland) Act*, 1870 (33 & 34 *Vict. c.* 46), *sect.* 45—*Landlord and Tenant (Ireland) Amendment Act*, 1872 (35 & 36 *Vict. c.* 32), *sect.* 2—*Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49), *sect.* 30—*Irish Land Act*, 1903 (3 *Ed.* 7, *c.* 37), *sect.* 54.

When the proprietor of a holding purchased under the Irish Land Act of 1903, subject to a land purchase annuity, purports to subdivide his holding without the consent of the Land Commission, the person in whose favour such attempted subdivision is made is not entitled to be registered as owner under the Local Registration of Title (Ireland) Act, 1891.

APPEAL from the decision of the Registrar of Titles.

Mary Geoghegan was registered as owner of a farm of 23 acres in Co. Limerick, subject to the usual land purchase annuity. On May 25th, 1916, she assigned part of the holding to her son, Daniel Geoghegan, who applied to the Land Commission for their consent to the sub-division, which was withheld. Daniel Geoghegan, notwithstanding this, applied to be registered as owner in fee of his portion, which application the Registrar of Titles granted.

From this decision the Land Commission appealed.

The following are the material sections cited in argument:—

Landlord and Tenant (Ir.) Act, 1870, s. 45.— . . . Any holding charged by order of the Landed Estates Court in manner aforesaid [i.e. with a purchase annuity] shall not, without the consent of the Board [i.e. the Commissioners of Public Works in Ireland], be alienated, assigned, subdivided, or sublet during such time as any part of the annuity charged on such holding remains unpaid, and any part of such holding alienated, assigned, subdivided, or sublet in contravention of this section shall be forfeited to the Board, to be held by them for public purposes.

Landlord and Tenant (Ir.) Amendment Act, 1872, s. 2.—In every case in which an advance shall be made after the passing of this Act for the purchase of a holding under the provisions of this or the principal Act,

Ross J. 1917.

In re GEOGHEGAN.

notwithstanding the provisions as to forfeiture in the said principal Act contained, the Board shall have power to sell the holding or any part thereof, and to convey the same to a purchaser, in the event of such holding or any part thereof having been alienated, assigned, subdivided, or sublet, without the consent of the Board, while any portion of the annuity remained unpaid: and the Board may sell the said holding or any part thereof by public auction, due notice being given by the Board of the time, place, terms, and conditions of such sale; and the Board shall apply the proceeds derived from such sale in the first instance to the payment of all moneys due on foot of such annuity, and in redemption of so much of the said annuity as shall at the time of such sale remain charged on said holding, and of all costs and expenses incurred by the said Board in relation to such sale, or otherwise in respect of such holding, and shall pay the balance to the person entitled by law to receive the same.

Land Law (Ir.) Act, 1881, s. 30 (1).—As between the Land Commission and the proprietor for the time being of any holding . . . (*a*) the holding shall not be subdivided or let by such proprietor without the consent of the Land Commission, until the whole charge due to the Land Commission has been repaid: (*b*) where the proprietor subdivides . . . the Land Commission may cause the holding to be sold.

Irish Land Act, 1903, s. 54 (1) (*a*).—As between the Land Commission and the proprietor for the time being of any holding for the purchase of which the Land Commission have after the commencement of this Act made any advance under the Land Purchase Acts . . . the holding shall not be divided or let without the consent of the Land Commission, and if the proprietor subdivides or lets the holding or any part thereof without such consent, the Land Commission may cause the holding to be sold.

Sub-s. (2).—Not more than one person shall, without the consent of the Land Commission, be registered as the owner of a holding under Part IV of the Local Registration of Title (Ireland) Act, 1891.

Local Registration of Title (Ir.) Act, 1891, s. 35 (1).—A registered owner of land may transfer the land or any part thereof, and the transferee shall be registered as owner of the land transferred.

S. 38 (1).—Nothing in this Act shall affect the provisions of any Act of Parliament by which the alienation, assignment, subdivision, or subletting of any land is prohibited or in any way restricted.

Wylie K.C. (with him *Babington*), for the appellants:—

The policy of the Land Purchase Acts has been to forbid the subdivision of holdings. The Registrar held that there was no prohibition against subdividing: that the Land Commission had a power of sale, and nothing more. I submit that the Legislature has prohibited and restricted subdivision, and that the power of sale given to the Land Commission was only added as a sanction.

The first enactment of the Irish Land Code on the point is the Landlord and Tenant (Ireland) Act, 1870 (33 & 34 Vict. c. 46), sect. 45. That section provides that a holding is not to be subdivided, and if it is subdivided it shall be forfeited. The forfeiture clause has been relaxed by the Landlord and Tenant (Ireland) Amendment Act, 1872 (35 & 36 Vict. c. 32), sect. 2, and a provision made for sale instead. But the prohibition against subdivision is in no way affected. The next enactment dealing with this subject is sect. 30 of the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49). That section is simply a codification of the previous enactments.

[Ross J.:—The effect of that is the Land Commission may ignore the subdivision and sell the whole?]

Yes. Sub-s. (*c*) of the same section, which simply enacts that when the title is divested from the proprietor by bankruptcy, the Land Commission may cause the holding to be sold, shows that when a penalty only, as distinguished from a prohibition, was required, a penalty only was provided for. If the earlier enactments had not intended expressly to forbid subdivision, they would not have purported to do so. The last clause of sect. 30 of the Act of 1881, which repeals portions of sects. 44 and 45 of the Act of 1870, preserves the distinction between a prohibition and a penalty. The distinction made in the earlier Acts has been preserved, save that sale has been substituted for forfeiture in the tenant's case.

Next, sect. 54, sub-s. 1 (*a*), of the Irish Land Act, 1903 (3 Ed. 7, c. 37), amalgamates (*a*) and (*b*) of sect. 30, sub-s. 1, of the Act of 1881, and repeats the distinction between a prohibition and a penalty. Where the Legislature could forbid subdivision it did so. It could not forbid it in the case of death, but could, and did, forbid voluntary subdivision. Sub-s. 2 of sect. 54 of the Act of 1903 is an absolute prohibition, and shows clearly the intention of the Legislature. The word "holding" is defined in sect. 57 of the Act of 1881.

[Ross J.:—Does that apply to the Land Purchase Code?]

Yes; because the advance is made on the basis of the relationship between landlord and tenant (see also sect. 2, sub-s. 3, of the Act of 1903, and sect. 17, sub-s. 3, of the Act of 1909). The respondent

Ross J. 1917.

In re GEOGHEGAN.

relies on sect. 35, sub-s. 1, of the Local Registration of Title (Ireland) Act, 1891; but that is subject to reservations. That and the following sections are in conflict with the provisions of the Acts of 1881 and 1903. In any event, sect. 38, sub-s. 1, of the Act of 1891 operates as a repeal pro tanto of the Act, and saves the previous enactments. On Mary Geoghegan's folio there is the entry provided for by sub-s. 2 of the Act of 1891: and if Daniel Geoghegan is registered, he will have a similar folio. On the folio of each will appear a printed note restraining them from doing the very thing they will have attempted to do. The Registrar in his notes ignores the distinction between a prohibition and a penalty. *Farrell* v. *Donnelly* (1), to which he refers, is a case of a sub-division in invitum.

Jellett K.C. (with him *James Comyn*), for the respondent:—

This is a transaction between Mary Geoghegan and Daniel Geoghegan to which the Land Commission is no party. In some of the Acts to which reference has been made the restriction is governed by the words "as between the proprietor and the Land Commission"; in others these words do not appear. They do not appear in sect. 45 of the Act of 1870; under that section alienation, &c., was absolutely forbidden. Section 30 of the Act of 1881 contains the qualifying words, and therefore on its face only applies as between the Land Commission and the proprietor. The object of the section was to safeguard the former's rights; in the event of alienation or sub-division the Land Commission were to be in the same position as if nothing of the kind had been done. Section 54 of the Act of 1903 contains the like qualification. The Land Commission can ignore the sub-division or alienation, and exercise its power of sale, but is not bound to do so; the transaction is voidable, not void. The last-mentioned section is divided into five sub-sections, of which sub-s. 1 deals with the relations between the Land Commission and the proprietor. An attempt has been made to incorporate into sub-s. 1 the provisions of sub-s. 2, which is expressly confined to Part IV of the Local Registration of Title (Ireland) Act, 1891, which in its turn deals with only devolution

(1) [1913] 1 I. R. 50.

of title on the death of a registered owner. Therefore the effect of sub-s. 2 is that on the death of a registered owner only one person is to be registered. Sub-s. 1 refers to acts inter vivos, and has nothing to do with sub-s. 2. Sub-s. 3 forbids the mortgaging of a holding beyond a certain limit.

[Ross J.:—That was for the benefit of the tenant, not of the Land Commission.]

If transactions under sub-s. 1 were to have been null and void, it could have been easily so expressed. The Act of 1870 provided that, if an attempt were made to sub-divide a holding, it was to be forfeited and there was an end of it. Again, sect. 11 of the Evicted Tenants (Ireland) Act, 1907, absolutely forbade the making of a holding purchased by an evicted tenant available in bankruptcy; but sect. 54, sub-s. 1, of the Act of 1903 contemplates the possibility of alienation, and provides certain consequences to follow. It is suggested that sect. 38, sub-s. 1, of the Act of 1891 nullifies sect. 35, sub-s. 1, of the same statute; but see the judgment of Holmes L.J. in *Farrell* v. *Donnelly* (1).

[Ross J.:—This is a question of registration of title. What is the use of registering the proprietor as owner in fee, if the Land Commission can sell him out at any time? What title could such a proprietor give?]

The transaction is voidable, not void.

[Ross J.:—If a man can turn me out of my house at any moment, it is ridiculous to register me as owner in fee.]

If the proprietor had no estate in the lands, he could not touch a penny of the purchase-money.

[Ross J.:—The right to remain on the land is wholly different from the right to receive the money.]

Certainly; but when on distribution of the purchase-money you find that A. B. is entitled to share, you cannot say he has no interest in the lands.

[Ross J.:—Your argument is, that if the Land Commission does not interfere, the tenant can sub-divide or alien as much as he likes, and the alienee can get registered; and then the Land Commission can sell, and that is the only remedy?]

Yes.

(1) [1913] 1 I. R. 50, at p. 60.

Ross J. 1917. *In re* GEOGHEGAN.

[Ross J. :—What then is the object of sect. 54, sub-s. 2, of the Act of 1903 ?]

To provide against a much greater class, to prevent registration of an unlimited number of next-of-kin.

Babington, in reply :—

The Land Commission take the view that they are not only responsible to the Treasury for collecting revenue, but also are the persons in whom is vested the duty of considering whether such sub-division as is here contemplated is to be allowed or not. This question of sub-division is one of public policy. It is contrary to the policy of the statutes that holdings should be sub-divided until the consent of the Land Commission has been obtained. Part IV of the Act of 1891 seems to contemplate stereotyped holdings. Sub-s. 2 of sect. 54 of the Act of 1903 is not confined to devolution under Part IV of the Act of 1891. Its effect is that, when dealing with land to which Part IV applies, only one owner is to be registered, whether the sub-division takes place on death or inter vivos. Section 2 of the Act of 1881 forbade a tenant to sub-divide or sub-let his holding without the landlord's consent. That provision, being general in its terms, was held an absolute prohibition, founded on public policy : *O'Kane* v. *Burns* (1); *Fogarty* v. *Shanahan* (2).

Cur. adv. vult.

June 29.

Ross J. :—

Mary Geoghegan is the registered owner of a farm purchased under the Irish Land Act of 1903, subject to an annuity of £4 8*s.* 2*d.* The holding contains twenty-three acres of land that cannot be very valuable. She has executed a deed whereby she transferred portion of the lands for natural love and affection to her son. The transferee applied to the Land Commission for its consent to the sub-division, which the Land Commission refused to give. The question is whether the Registrar is bound to register this deed. We are all familiar with the statutes forming the code prohibiting assignment and sub-letting, and with the numerous decisions thereon. The reasoning on which all the decisions rest is that it is a matter of public policy. Excessive sub-division of

(1) [1897] 2 I.R. 591. (2) [1896] 2 I. R. 273.

small farms is looked on as one of the gravest evils, and the Courts have always been ready to interpret the prohibitory provisions in the most stringent manner. Deeds executed in violation of the prohibition have always been held inoperative and void for all purposes.

If the landlord sued the assignee for rent, the assignee could set up the invalidity of the assignment: *Donoughmore* v. *Forrest* (1). The assignor for value could in the teeth of his own deed eject the assignee. The lands may be taken under an execution against the assignor: *Troy* v. *Kirk* (2). The code was even administered with more severity. The prohibitive words were usually "shall not" or "it shall not be lawful," which had the effect of nullifying the instrument; and under the Land Act of 1870 the lands sub-divided in contravention of the section were forfeited; or again, the milder penalty was that the department that had advanced the loan might sell the holding.

The Legislature was waging war against uneconomic holdings. In our own time we see this tendency taking effect in another way. The Land Commission in the course of land purchase can increase the area of the holding by the addition of land bought for the purpose. There must come a time, however, when the annuity ceases to be payable, and the tenant can do what he likes with his own. It is a matter of history that a determined effort was made by the framers of the Act of 1903, by imposing a perpetual small quit-rent, to prevent sub-division after the fee had been acquired. This attempt was, however, ultimately abandoned.

In this case it has been forcibly contended that the door that has been kept bolted and barred so long is now thrown open to the Irish tenants, and that they are encouraged and invited to tread the path that leads to destruction. If a change so momentous has been introduced, I should expect it to be expressed in unambiguous language.

The learned Registrar seems to think that because the penalty for contravention of the prohibition is mitigated, the prohibition itself is in some way affected. I cannot agree with this reasoning. So long as every section contains the deed-destroying words

(1) I. R. 5 C. L. 443. (2) Alcock & Napier, 326.

Ross J. 1917. *In re* GEOGHEGAN.

"shall not" or "it shall not be lawful," the modification of the penalty matters very little.

The Act of 1881 had in view the possibility of land purchase to a substantial extent. Sect. 30 deals with the matter. It begins with what is called a qualification in the introductory words, "as between the Land Commission and the proprietor." Sub-s. (*a*) contains the prohibition, using the words "shall not," and sub-s. (*b*) contains the penalty—sale by the Land Commission. In the former state of affairs there were a tenant and a landlord with power to prevent alienation by withholding his consent. In the new state of affairs the landlord disappears, the tenant becomes a proprietor, and the Land Commission, who have advanced the money, have the power to prevent alienation by withholding consent. Sect. 54 of the Act of 1903 is practically the same as sect. 30 of the Act of 1881, and it is on the construction of that section that this decision must mainly depend. Do the opening words of the section of necessity involve a qualification at all? Or are these introductory words merely used owing to the change in the tenant's status? Do the words mean to confer a licence and authority on the proprietor to sub-let without restriction, provided that such sub-letting does not affect the Land Commission or the annuity it receives?

The Land Commission are not only agents for the Treasury in so far as they are bound to use all possible endeavours to enforce payment of the annuities, but they are also the body to whom is entrusted the duty of carrying into effect the policy of the Acts.

Lord Justice Holmes was of opinion in *Farrell* v. *Donnelly* (1) that there is a distinct qualification to be found in the opening words of the section, and that the sub-division forbidden in sub-sect. 1 (*a*) is only forbidden in so far as it would affect in any way the Land Commission or the annuity payable thereto. He indicates that if the four owners in that case agreed to divide the lands into four distinct parts, and each to take possession of one of them instead of his previous undivided share, the agreement would be enforceable. This view is not necessary for the decision of the case. The Lord Chancellor and the Lord Chief Justice expressed no concurrence in this opinion. They simply followed *Flood's Estate* (2), which decided that

(1) [1913] 1 I. R., at p. 60.

(2) 7 L. R. Ir. 545.

the prohibitions against assignment and subdivision are limited to voluntary acts of the parties, and do not apply to proceedings taken by creditors to enforce payment of debts due to them. This is all the case really decided, but the view of the Lord Justice implies unrestricted subdivision, provided the security for the annuity is not affected.

We turn to sub-sect. 2, and find it enacted that not more than one person shall, without the consent of the Land Commission, be registered as owner of the holding under Part IV of the Local Registration of Title Act. Part IV is conversant with the devolution of registered land on the death of the owner; but why is subdivision expressly prohibited in these cases, and permitted in cases dealt with in the first part of the section? Because, Mr. Jellett says, the section says so.

We ought to be very sure that the section does say so before we arrive at a conclusion so inexplicable. Sect. 35 of the Registration of Title Act is relied on by the applicant—"a registered owner may transfer the land or any part thereof, and the transferee shall be registered as owner of the land transferred." The contention founded on this section is at once destroyed when we turn to section 38:—"Nothing in this Act shall affect the provisions of any Act of Parliament by which the alienation, assignment, or sub-letting of any land is prohibited, or in any way restricted." Sub-sect. 2 provides as follows:—"It shall be the duty of the registering authority to note upon the register in the prescribed manner the prohibitive or restrictive provisions of any such Act of Parliament; but such provisions shall be deemed to be burdens to which, though not registered, all registered land is by this Act declared to be subject." This section was evidently framed to deal with the restrictions imposed by sect. 30 of the Act of 1881.

Now if a deed in contravention of the restriction must be registered, what is the object of noting in the register the prohibitive or restrictive provision? Why should such provisions be deemed to be burdens on the land if the proprietor can deal with it as he seeks to do here. The absurdity of it all is brought home to us when we read the note in the register:—"These lands are subject to the restrictions as to

Ross J.
1917.
In re
GEOGHEGAN.

subdivision, subletting, charging contained in sect. 54 of the Irish Land Act, 1903, and to the restrictions as to the purchase of other holdings and as to timber contained in sect. 32 of the Irish Land Act of 1909." The last two restrictions are real restrictions, and enforceable; but the first is only noted for the purpose of being violated. If this deed to the proprietor's son is registered, a similar futile note must be put on the new folio.

There is one other view to be considered. Assuming the view expressed by Lord Justice Holmes to be the true view, there is some class of subdivision forbidden, i.e., a subdivision that would affect the Land Commission or the annuity payable thereto. The Land Commission themselves are the best judges to decide whether this particular subdivision would affect them and their annuity. They have given effect to their view by refusing to consent to this subletting. Suppose that I am not bound by their view, that the subletting diminishes the security for the annuity, could any person acquainted with Irish conditions hesitate for a moment to arrive at the conclusion that to cut up this small holding among a number of pauper proprietors would not gravely imperil the security? The thing speaks for itself. A sale in case of default in payment of the annuity would be simply impossible.

I am wholly unable to understand how the Registrar arrives at the conclusion that the registration of this deed would be an advantage to the Land Commission, and would facilitate them in selling the holding. I do not forget that this deed itself would not be effective till registered. I am, therefore, of opinion that I ought to reverse the decision of the learned Registrar, for whom, as a lawyer of great mental precision and of real legal instinct, I have the greatest respect.

Solicitor for the appellant: *The Solicitor to the Land Commission.*

Solicitor for the respondent: *Robert A. Macaulay.*

T. C. T.

HAHESY *v.* GUIRY.

M. R.
1917.
June 13, 14, 27.

Fraudulent Breach of Trust—Settlement—Holding purchased under the Land Purchase Acts—Purchasing Tenant a Limited Owner—Sale by the Irish Land Commission to recover Arrears of Annuity—Collusion between purchasing tenant and purchaser at sale—Purchaser declared a trustee for the persons entitled in remainder.

A and B (his wife) were entitled under a settlement to lands held under a tenancy from year to year for their joint lives. A and B purchased the holding under the provisions of the Purchase of Land (Ireland) Acts, and they were registered as limited owners thereof under the provisions of the Local Registration of Title (Ireland) Act, 1891. With a view to making title to the absolute interest in the lands they allowed the purchase-annuity to run into arrear, and on the lands being put up for sale by the Irish Land Commission, the defendant, who was privy to the transaction, bought them for a sum sufficient to cover the outstanding arrears of the annuity. The plaintiff represented the persons entitled in remainder under the settlement.

Held, that A and B had been guilty of a breach of trust amounting to a fraud to which the defendant had been a party, and that the defendant must be held to be a trustee of the lands for the plaintiff.

TRIAL OF ACTION.

Thomas Hahesy, who was tenant of part of the lands of Aughmore, in the barony of Upperthird and county of Waterford, held under a yearly tenancy at the rent of £90, by a settlement dated the 26th February, 1884, executed on the marriage of his son, John Hahesy, with Honoria Walsh, assigned the farm and the stock and chattels thereon to a trustee upon trust for his son, the said John Hahesy, and the said Honoria Walsh during their joint lives, or until the said John Hahesy should assign or attempt to assign the said lands, or should become bankrupt or suffer judgment to be recovered against him and execution thereon levied, and upon the happening of any of the said events then upon trust to raise by sale or mortgage of the said lands the sum of £400, and hold the same in trust for the said Honoria Walsh. The settlement contained no provision for the issue of the marriage. The marriage took place, and in 1888 John Hahesy

M. R. 1917.

HAHESY v. GUIRY.

and his wife purchased the fee-simple of the lands under the Land Purchase Acts. Thomas Hahesy died in 1893 intestate, leaving him surviving as his next-of-kin his sons Thomas Hahesy (the plaintiff), John Hahesy, and James Hahesy. On the 18th May, 1904, the said John Hahesy and Honoria Hahesy were registered as limited owners of the said lands pursuant to the provisions of the Local Registration of Title (Ireland) Act, 1891.

In 1908 John and Honoria Hahesy entered into an agreement with the defendant, who was a nephew of Honoria Hahesy, for the sale of the lands to him, but this sale was not completed owing to its being discovered that John and Honoria Hahesy were not absolute owners. In 1909, 1910, and 1911 the annuity payable to the Irish Land Commission was allowed to fall into arrear, and on the 7th February, 1912, the lands were put up for sale by auction by the Irish Land Commission, and bought by the defendant for £140, a sum just sufficient to cover the amount of the arrears. After the sale John and Honoria Hahesy continued to reside on the lands with the defendant. Honoria Hahesy died on the 25th December, 1914, and John Hahesy on the 12th March, 1915. On the 1st December, 1916, the plaintiff obtained a grant of letters of administration of the personal estate of Thomas Hahesy, the settlor in the settlement of 1884.

The plaintiff claimed a declaration that the sale by the Irish Land Commission was procured by the collusion of the defendant with John and Honoria Hahesy, and that the purchase by the defendant was a fraud on the persons entitled under the settlement to the lands, in remainder expectant on the deaths of John and Honoria Hahesy; and a declaration that the defendant was, from the death of John Hahesy on the 12th March, 1915, a trustee of the lands for the plaintiff as personal representative of Thomas Hahesy.

The defendant denied the charges of fraud and collusion brought against him by the plaintiff.

Serjeant Matheson K.C., *Healy K.C.*, and *Matheson*, for the plaintiff.

Serjeant Sullivan K.C., *Conner K.C.*, and *Sealy*, for the defendant.

Cur. adv. vult.

M. R.
1917.

HAHESY
v.
GUIRY.

June 27.

O'CONNOR M.R.:—

This action was brought to have the defendant declared a trustee for the plaintiff of a farm purchased by him from the Irish Land Commission in the circumstances which I am about to state. The lands of Aughmore containing about ninety-nine acres were formerly held by Thomas Hahesy under a yearly tenancy at the yearly rent of £90. The tenant had a son, John Hahesy, who in the year 1884 had contracted to marry Honoria Walsh, who had a fortune of £250. The father, with a view of advancing the son, by a settlement, dated 26th February, 1884, conveyed the farm and the stock and chattels thereon to a trustee upon trust for his son and his intended wife during their joint lives, or until the son should assign or attempt to assign the lands, or become bankrupt or suffer judgment to be recovered against him and execution thereon levied, and upon the happening of any of the said events, then upon trust to raise by sale or mortgage of the farm £400 for the intended wife.

This settlement gave nothing more than a joint tenancy to the husband and wife during their joint lives, so that on the death of one of them the survivor would have no interest in the property. There was no provision for issue. One must have a suspicion that there was some stupid blunder on the part of the draughtsman, but the settlement must be taken as found. Subject to the estate given to the husband and wife, there was a resulting trust for the settlor, Thomas Hahesy.

In the year 1888 the fee-simple of the lands was purchased by John Hahesy and his wife under the Land Purchase Acts, and the lands were conveyed to them in fee by the Irish Land Commission, subject to a terminable annuity which became reducible every ten years. Thomas Hahesy, the father, died in 1893, intestate, leaving as his next-of-kin three sons, viz., the plaintiff, the said John Hahesy, and James Hahesy. In the year 1904 the lands were registered under the Local Registration of Title Act in the names of John Hahesy and his wife as limited owners.

In or about the year 1908 John Hahesy and his wife determined to sell the farm, and an offer was made for it by John's brother, the plaintiff in this action, and an offer was made

M. R. 1917. HAHESY *v.* GUIRY.

by the defendant, who was a nephew of the wife. An agreement, dated the 29th December, 1908, was entered into by the defendant with John and his wife for the purchase of the farm. This led to an investigation of the vendors' title, and it was discovered by the defendant's solicitor that they were only limited owners. This came as a great surprise to John Hahesy and his wife, who thought that they were absolute owners under the settlement. They then, according to the evidence, proceeded to devise means for rectifying their title, and somehow or other a brilliant idea occurred to or was presented to them. They determined to allow the annuity payable to the Land Commission to fall into arrear, so that the Land Commission would sell the lands under their statutory powers, and John and his wife, or some person for them, would buy them in and so get a new title freed from the trusts of the settlement and all prior claims. The defendant may not have been a party to this scheme, but he certainly knew all about it, and it was several times discussed with him. The plan of action was this. The lands were to be cleared of all the stock and set for grazing. The annuity was to be allowed to get into arrear, and as the Land Commission would find no movable chattels on which to levy execution, it would be necessary to put up the lands for sale.

Let us see now how this was carried out. On the 1st November, 1909, a half-year's annuity amounting to £27 8*s.* 11*d.* fell due and was not paid. On the 29th November, 1909, an auction was called and everything on the lands was sold. The auction realized £342 18*s.* and that amount was paid to Mrs. Hahesy by the auctioneer, but although that money was available the small debt of £27 8*s.* 11*d.* was not discharged. On the 1st November, 1910, a further full year's annuity became due amounting to £54 17*s.* 10*d.*, and on the 1st November, 1911, a further full year's annuity became due amounting to £54 17*s.* 10*d.* There were then due arrears of two and a-half years, amounting to £137 4*s.* 7*d.* In the meantime the lands were let in grazing, and none of the grazing money or the money realized by the auction was used for payment of the annuity. Indeed it was not contended that the non-payment of the annuity arose from inability to pay it. It was even conceded that the payment was withheld

deliberately by John Hahesy and his wife, but it was urged that that could not affect the defendant's title.

The lands were advertised for sale by the Land Commission, and the day of sale was announced as the 7th February, 1912. Previous to the sale, the defendant was at Mr. and Mrs. Hahesy's house. They went together to the sale. Although the farm was a valuable and attractive one, the public did not attend the sale; and the evidence is conclusive that the public were warned not to interfere, as the farm was to be bought in by the family. When the farm was put up there was no bidding, whereupon a solicitor who attended on behalf of the defendant asked the auctioneer how much was due on the farm. He was informed that £140 would cover the amount due, whereupon the solicitor bid £140 for the defendant, and the farm was knocked down to him. The solicitor then paid the auctioneer £147, being the price bid, with £7 auction fees. I am satisfied that this was the defendant's own money, and I was asked to treat the defendant as a stranger coming into the auction-room and bidding for the lands at an auction held by a vendor having a title paramount which enabled him to sell over the heads of the owners, and which could not be affected by the conduct of the owners.

But, on the evidence, I cannot treat the defendant as a stranger to the plans and contrivances of Hahesy and his wife. He was deeply involved in them. He was their confidant when they were being planned. Nay more, he was an active participant, because at the very time of the sale the proceeds of the sale of the stock stood in the Bank in the joint names of the defendant and Mrs. Hahesy; and we have it that he accompanied Mr. and Mrs. Hahesy to the auction-room, and that he knew that John Hahesy had warned the public to keep away. It is further impossible to believe that there was not an understanding between the Hahesys and the defendant that they were to be allowed to continue to remain on the farm notwithstanding the sale, because if not they would have been rendered homeless. The sale was nothing more than a farce. The farm was worth several hundreds of pounds.

What was the legal position of the Hahesys? In equity they were only owners of the farm for their joint lives, but in law they were owners in fee simple. They held the fee in trust for the

M. R. 1917.

HAHESY v. GUIRY.

owner of the reversion. They were bound to keep down the annuity, and they were at least bound when the annuity fell into arrear and the Land Commission proceeded to a sale to see that the highest possible price was obtained. They deliberately violated their duty, and were guilty of a flagrant breach of trust which, in the eyes of a Court, amounts to a fraud. The defendant knew all this, and, as the evidence shows, aided and abetted them, and if I were to hold that such a person could stand in the position of an independent and innocent purchaser, I would be offending against principles which have been enunciated in this Court from the very earliest times.

I will give judgment for the plaintiff, and it will take the form of a declaration as prayed for. I direct an account of the rents and profits of the lands received by the defendant as from the 12th March, 1915, and as I understand that the plaintiff admits that the defendant is entitled to credit for the purchase-money paid by him with interest at £4 per cent., I will so declare.

Solicitors for the plaintiff: *I. Thornton & Son.*
Solicitor for the defendant: *Joseph F. Quirk.*

A. H. W.

WALLACE *v.* M'CARTAN.

(1916. No. 741.)

Barton J.
1917.
April 25, 26, 27.
May 2, 16.

Nuisance—Sewer—Sewage—Stream—Unreasonable and negligent exercise of Statutory Power.

The plaintiff was owner and occupier of pasture and meadow lands, which adjoined S. Street, in the outskirts of the town of D. A stream passed under S. Street into plaintiff's lands, and was the watering-place for his cattle. Defendant was the owner of some old houses in S. Street. They had no w.c. accommodation; but the surface-water from their yards was carried into a surface-water roadside drain which flowed into the stream before it entered plaintiff's lands. This drain was held to be a "sewer" within the meaning of the Public Health Acts, but it was admitted that it was unfit for carrying fæcal sewage, and that it would be insanitary and improper to use it for that purpose. The defendant built on the site of the old houses four new houses with w.c. accommodation. The defendant was a member of the local sanitary committee which was appointed to advise the sanitary authority upon sanitary questions. In that capacity he joined in advising the sanitary authority that there was no "main-sewer in S. Street," and that it was absolutely necessary to construct a new sewer for the drainage of defendant's house. The sanitary authority invited tenders for a new sewer, but did not proceed with the work. The defendant did not resort to his statutory remedy of complaint to the Local Government Board, but proceeded to connect his new w.c.'s with the surface-water sewer, and to let his houses to tenants. The necessary and obvious result of his doing so was that the fæcal sewage, within four minutes of leaving his premises, passed through the surface-water sewer into the plaintiff's stream and pasture lands, and caused a serious and injurious nuisance. The defendant claimed an absolute right to cause his house-drains to empty into any sewer of the sanitary authority regardless of the consequences to third parties.

Held, that the defendant had exercised his statutory right of causing his drains to empty into the sewer of the sanitary authority in an unreasonable and negligent manner, and without having reasonable regard to the rights of third parties; and that he should be restrained by injunction from discharging fæcal sewage into the surface-water sewer so as to cause it to flow or pass into plaintiff's land, and so as to pollute plaintiff's stream.

TRIAL OF ACTION.

The action was brought claiming an injunction and damages in respect of trespass and nuisance by the defendant by the discharge

Barton J. 1917.

WALLACE v. M'CARTAN.

of fæcal sewage into the plaintiff's stream, and upon the plaintiff's meadows and pasture lands.

The material portions of the statement of claim were as follows:—

1. The plaintiff is the owner of certain pasture lands situate on the west side of Stream Street, Downpatrick, in the County of Down, through which there runs a natural stream, and is entitled to the flow of the stream through his land, pure and unpolluted, for the watering of cattle, and for other purposes.

2. The defendant is the owner of certain lands on the east side of Stream Street, separated by the County Road from the pasture lands of the plaintiff.

3. The defendant recently built on his lands four dwelling-houses with water-closets, and connected the drains of the water-closets with a surface-channel or drain which runs under the street, and is used for the purpose of conveying surface water only into the stream.

4. The houses of the defendant have been let to tenants by the defendant, and since the date of the lettings the tenants have discharged all the sewage of the houses and other foul and impure matter into or through the surface channel or drain and thence into the stream, which thereby became polluted and foul, rendering it unfit for watering cattle.

The plaintiff claimed an injunction and damages.

The defendant by his defence denied the averments of the plaintiff, and alleged that the plaintiff's stream was foul and polluted, and a sewer within the meaning of the Public Health (Ireland) Acts, and that the surface channel or drain was also a sewer within the meaning of the said Acts, and that any of the acts complained of were done under and in pursuance of the statutory authority in that behalf conferred on him by the said Acts.

The following statement of facts is taken from the judgment of Barton J.:—

The plaintiff was the owner and occupier of valuable meadow and pasture lands which adjoined a road or street called Stream Street, in the outskirts of the town of Downpatrick. A natural

stream flowed under and across the road, and thence into plaintiff's lands, where it constituted the watering-stream for his cattle. Before entering plaintiff's lands it constituted a public watering-place on the roadside, used by the inhabitants for watering their cattle. It was part of the defendant's case that this stream had become a sewer; but it was held by the Court, on the evidence, that this was not so. The defendant was the owner of some old houses in Stream Street, which had no w.c.'s or other sanitary accommodation. The surface-water from the yard of these houses was carried into a roadside drain, which ran along Stream Street, and flowed into the stream just before it entered plaintiff's land. It was held by the Court that this roadside drain was technically "a sewer" within the meaning of the Public Health Acts, because it carried away the surface-water of several premises. But it was admitted by defendant's witnesses that it was not made, or intended, or fit, for carrying away more than surface-water, and that it would be "insanitary and improper" to use it for carrying fæcal sewage.

The defendant in 1914 built, on the site of the old houses, four new houses with w.c. accommodation. He employed Mr. Nolan, C.E., the architect and engineer to the local sanitary authority, as his architect and engineer. The defendant was a member of the Downpatrick Sanitary Committee, which was appointed by the local sanitary authority to advise them on sanitary affairs. Mr. Nolan, who was superintending the building of defendant's houses, reported to the local sanitary authority that these new houses had been built with a w.c. attached to each house. He added, "I am aware that there is no main sewer in Stream Street, and would suggest that the local sanitary committee be asked to report on the question of providing a new sewer." The matter was referred to the sanitary committee, which met on February 14th, and had before them Mr. Nolan's report, and a letter from him suggesting to them to consider, and to report upon, the question of providing a new sewer at Stream Street. The defendant was present at the meeting of the sanitary committee, at which a sub-committee was appointed to visit the locus in quo and to report. The sub-committee visited the place with Mr. Nolan. The defendant was present. On the following

Barton J. 1917. WALLACE v. M'CARTAN.

day the sanitary committee met, the defendant being present. The report of the sub-committee was received and considered. It was to the effect that a new sewer in Stream Street for the drainage of the new houses was "absolutely necessary and should be made." This report was adopted by the sanitary committee, and was forwarded by them to the sanitary authority. The sanitary authority adopted the report, and instructed Mr. Nolan to prepare specifications and to invite tenders for a new sewer.

The advertisement for tenders attracted the attention of plaintiff, who wrote to the sanitary authority, warning them against discharging sewage into his meadow and pasture lands or into his stream. A correspondence ensued, and the sanitary authority did not proceed with the scheme.

The defendant did not exercise his statutory right (under sect. 15 of the Irish Public Health Act, 1878, corresponding to sect. 299 of the English Public Health Act, 1875), of complaining to the Local Government Board of the failure of the local sanitary authority to provide their district with sufficient sewers. But he proceeded to connect the w.c.'s of his new houses with the surface-water sewer in Stream Street, and to let the houses to tenants, who went into occupation of them and used the w.c.'s.

It was admitted by the defendant, and by his witnesses, that the necessary and obvious result of connecting his w.c.'s with the surface-water sewer was to cause the fæcal sewage, within four minutes of leaving his houses, to flow into the plaintiff's stream and lands, and to create a serious and injurious nuisance. Several witnesses stated that they saw solid fæcal matter and w.c. paper passing daily and hourly from defendant's houses into and along plaintiff's stream, and fouling his land.

The defendant admitted that this serious nuisance was created, and that he knew that it was the necessary consequence of his act in connecting his w.c.'s with the surface-water sewer. He claimed (under sect. 23 of Irish Public Health Act, 1878, which corresponds to sect. 21 of the English Public Health Act, 1875) an absolute right to cause his house-drains to discharge into any sewer of the sanitary authority, regardless of the consequences to third parties, and contended that plaintiff's remedy was against the local sanitary authority, or under the Rivers Pollution Acts.

Serjeant Matheson K.C., *S. L. Brown K.C.*, *Whitaker K.C.*, and *Harley*, for the plaintiff, referred to sections 2, 15, 16, 19, 21, 23 of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), and to section 15 of the Public Health (Ireland) Act, 1896 (59 & 60 Vict. c. 54), and to the following authorities:—*Gibbings* v. *Hungerford* (1), *Kinson Pottery Co.* v. *Poole Corporation* (2), *Graham* v. *Wroughton* (3), *O'Neill* v. *Walsh* (4), *Wincanton Rural District Council* v. *Parsons* (5).

R. F. Harrison K.C., *H. Wilson K.C.*, and *R. D. Orr*, for the plaintiff, relied on the judgment of Holmes L.J., in *Gibbings* v. *Hungerford* (1), and on the statutory right conferred by section 23 of the Public Health (Ireland) Act, 1878. They argued that the sanitary authority were alone liable for the damage done to the plaintiff, and they referred to the following authorities:—*Ferrand* v. *Hallas Land Building Co.* (6), *Butterworth* v. *West Riding of Yorkshire Rivers Board* (7), *Falconar* v. *Corporation of South Shields* (8), *Molloy* v. *Gray* (9), *Fordom* v. *Parsons* (10).

Cur. adv. vult.

May 16.

BARTON J. [having stated the facts, and having held that the plaintiff's stream had not become a sewer, and that the surface-water drain was a "sewer" within the meaning of the Public Health Act, proceeded]:—

The special facts of this case bring it, in my opinion, within the rule that a person exercising a statutory power cannot rely upon the statute as a shield, unless he exercises the statutory power reasonably, without negligence, and with a due regard to the rights of third parties.

Here we have the defendant, a public functionary, one of the appointed advisers of the sanitary authority, advising them that there was "no main sewer" at this place fit for the purpose of draining these w.c.'s, and that before his w.c.'s could be used it was "absolutely necessary" that a new sewer should be made.

(1) [1904] 1 I. R. 211.
(2) [1899] 2 Q. B. 41.
(3) [1901] 2 Ch. 451.
(4) 39 I. L. T. R. 252.
(5) [1905] 2 K. B. 34.
(6) [1893] 2 Q. B. 135.
(7) [1909] A. C. 45.
(8) 11 T. L. R. 223.
(9) 24 L. R. Ir. 258.
(10) [1894] 2 Q. B. 780.

Barton J. 1917. WALLACE v. M'CARTAN.

When they failed to carry out the work for his benefit, he deliberately discharged his w.c.'s into this surface-water sewer, knowing that it was an insanitary and improper thing to do, and that the necessary result must be to create a serious nuisance in his neighbour's pasture and meadow lands, and to pollute his neighbour's stream. Such conduct is entirely different from that of the ordinary occupier of house property, who connects his w.c.'s in a reasonable and usual way with the sewage system of his district.

The defendant's object may have been to force the hand of the local council. From that point of view there is authority for the proposition that his conduct was not only unreasonable, but also negligent. He had a statutory remedy, which, as was held in *Passmore's Case* (1) and in *Robinson's Case* (2), was the proper and only remedy of an occupier to compel the sanitary authority to effectually drain the district. That remedy was a complaint to the Local Government Board under sect. 15 of the Irish Public Health Act, 1878, which corresponds to sect. 299 of the English Public Health Act, 1875. The Local Government Board, on receiving a complaint, can compel the sanitary authority to perform their duty. The defendant neglected to avail himself of this remedy, preferring to make a cess-pool of plantiff's lands and stream.

The rule that statutory rights (especially where they are permissive and not imperative) must be exercised, both in their inception and during their continuance, without negligence, and with a reasonable regard to the rights of third parties, is most frequently applied in the case of railway and other companies; but it is also applicable to the exercise of statutory powers by individuals. The rule is founded upon the presumed intention of Parliament that the powers, which it confers upon persons or corporations, should not be abused.

In one of the earliest cases it was laid down that, in exercising a statutory power, a man's conduct should be "limited by law and reason": *Leader* v. *Moxon* (3). In another case Gibbs C.J. said that a statutory power should not be exercised "arbitrarily or oppres-

(1) [1898] A. C. 387.
(2) [1897] 1 Q. B. 619.
(3) 2 W. Bl. 924, 926.

sively": *Sutton* v. *Clarke* (1). In another, Bayley J. put it that persons should exercise a statutory power "without malice and according to their best diligence and skill": *Boulton* v. *Crowther* (2). In another case Lord Truro laid it down that a statutory power should be exercised with "judgment and caution": *London and North-Western Railway* v. *Bradley* (3). Blackburn J., in a judgment adopted by the House of Lords, said that he (the person exercising a statutory power) "would be liable, if he neglected to use his best skill and diligence": *Mersey Docks Trustees* v. *Gibbs* (4). Lord Hatherley says that a person exercising a statutory power must act "in a reasonable and proper manner": *R.* v. *Churchwardens of Wigan* (5). Wickens V.-C. said that statutory rights should be exercised "with a reasonable regard to the rights of other persons": *Biscoe* v. *Great Eastern Railway Co.* (6). "In a proper manner," were Lord Macnaghten's words in *East Fremantle Corporation* v. *Annois* (7). A useful judgment on the subject is that of Farwell J. in *Roberts* v. *Charing Cross, Euston, and Hampstead Railway Co.* (8), where the rule is elaborately stated and discussed.

Lord Blackburn, in *Geddis* v. *Bann Reservoir* (9), speaking of the exercise of statutory powers of pouring water into a channel, said that "if by a reasonable exercise of the powers either given by Statute to the promoters, or which they have at Common Law, the damage would be prevented, it is, within this rule, negligence not to make some reasonable exercise of these powers." That passage was quoted and applied by Collins L.J. in *Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works* (10), who went on to say, "where statutory rights infringe upon what but for the Statute would be the rights of other persons, they must be exercised reasonably, so as to do as little mischief as possible."

The statute, in my opinion, does not confer upon the defendant an absolute right to destroy his neighbour's property. It imposes upon him no such obligation, and gives him no

(1) 6 Taunton, 34, 43.
(2) 2 B & C. 703, 705.
(3) 3 Mac. & G. 336, at p. 341.
(4) L. R. 1 H. L. 93, 113.
(5) 1 A. C. 611, 624.
(6) L. R. 16 Eq. 636, 640.
(7) [1902] A. C. 213, 218.
(8) 87 L. T. 732, 733.
(9) 3 A. C. 430, 458.
(10) [1898] 2 Ch. 603, 611.

Barton J. 1917.

WALLACE v. M'CARTAN.

such express or implied authority, Besides, it confers upon him a special remedy, for the default of the sanitary authority to provide a proper sewer, of which he has neglected to avail himself.

The defendant's case rests upon three main propositions—first, that, although the plaintiff has suffered an admitted wrong, his remedy is not against the defendant, but against the sanitary authority; secondly, that the defendant has an absolute right to exercise this particular statutory power, no matter what its consequences may be to third parties; and, thirdly, that, as the sewers are the property of the sanitary authority, they alone are concerned with the disposal of any sewage which any occupier may discharge into any sewer.

As regards the first point, I think it is clear that the plaintiff, in a case of mere failure by the sanitary authority to drain their district effectually, has no remedy against them either by mandamus: *Passmore* v. *Oswaldtwistle Urban District Council* (1); or by action: *Glossop* v. *Heston Local Board* (2); *Attorney-General* v. *Dorking Union* (3); *Attorney-General* v. *Clerkenwell Vestry* (4); *Robinson* v. *Workington Corporation* (5). The principle is referred to in *Sanitary Commissioners of Gibraltar* v. *Orfila* (6). In several of these cases it was pointed out that the only remedy against the sanitary authority for non-feasance is by a complaint to the Local Government Board. In the case of a sanitary authority wrongfully or negligently causing damage by their sewage operations, where the occupier is using the sewers in a usual and reasonable way, I agree that the proper remedy of an injured third party (and I shall assume, without expressing any opinion about it, his main, or even perhaps his only, common-law remedy) would be against the sanitary authority. But for mere non-feasance an injured third party has no remedy by mandamus or action against the sanitary authority.

It may be that the plaintiff has another remedy by proceedings in the County Court under the Rivers Pollution Act, 1876. But sect. 16 of that Act preserves his common-law right of action.

(1) [1898] A. C. 387.
(2) 12 Ch. D. 102, 121.
(3) 20 Ch. D. 595, 605.
(4) [1891] 3 Ch. 527, 534.
(5) [1897] 1 Q. B. 619.
(6) 15 A. C. 400, 411.

The Act has its pitfalls; and the plaintiff, who is complaining of injury to his lands as well as to his river, is not compelled to resort to it, even if it were clear that it would afford him adequate and sure relief.

As regards the second branch of defendant's argument—namely, that an occupier has an absolute right to discharge his fæcal sewage into the sewers of the sanitary authority, no matter how injurious the consequences must be to third parties—reliance was placed upon *Molloy* v. *Gray* (1) and *Fordom* v. *Parsons* (2). Those were not cases of actions by injured third parties, but of prosecutions by sanitary authorities, who themselves were in default, against occupiers who were reasonably using old sewers of long standing, and were doing no injury to any third party, and were not violating any common law right of any neighbour. Even in those cases the judges were careful to point out that the defendants were not only acting legally, but also properly and reasonably. Andrews J. (who admitted at p. 273 that he stood alone, differing in his reasons from Palles C.B., and in his decision from Dowse B.) observed at pp. 265 and 269 that the occupier was in that case not in any way to blame, but had exercised the right in a "legal and unobjectionable manner." Palles C.B. (whose judgment proceeded mainly upon the circumstance that the occupier had acquired a right of user before the passing of the Public Health Act, subject to which the sanitary authority acquired the sewers in question), pointed out at p. 274 that the nuisance was caused "by the use in a mode which is neither alleged nor proved to have been unusual or unreasonable of a w.c. which had been in existence in that house for at least seventeen years, during the entire of which time the drain or soil-pipe therefrom had been connected with and discharged into the public sewer in question." In *Fordom* v. *Parsons* (2), Mathew J. observed, at p. 784, "the respondent, who had for years (in that case twenty years), it is admitted, been legimately and lawfully using the drain or sewer provided by the sanitary authority, finds proceedings instituted against him, requiring him to cut off communications with the drain."

Cases where there was a reasonable, usual, and legitimate

(1) 24 L. R. Ir. 258.

(2) [1894] 2 Q. B. 780.

Barton J. 1917.

WALLACE v. M'CARTAN.

connexion for a number of years with a sewer for w.c. purposes, and no injury to any third party, are of no help in a case in which there has been a grave injury to a third party, and a new and deliberate connexion made with an unsuitable sewer in an unreasonable and negligent manner, with full knowledge that a serious injury must necessarily follow to a neighbour.

As regards the third branch of defendant's argument, reliance was placed upon *Ferrand* v. *Hallas* (1), and upon a dictum of Lord Robertson in *Butterworth's Case* (2). Those were cases in which the Court had to consider, in connexion with the Rivers Pollution Act, the question of discharging sewage or polluting liquid from a sewer into a stream. What was held in *Ferrand's Case* (1) was that, once in the sewer, the sewage ceased to be the property of the occupier, and became the property of the sanitary authority, with the result that the occupier was no longer concerned with it, had no control over it, and could not be restrained from discharging it into the stream or river in question. This case is not brought under statutory provisions for the protection of streams; and the order in this case will not conflict with that decision, or with Lord Robertson's dictum. The order in this case will not restrain defendant from discharging fæcal sewage from the sewer into the stream. It will restrain him from discharging fæcal sewage from his premises into the sewer. While the sewage is in his premises, it is still his property, under his control, and is his concern, and nobody else's. The statute does not authorize him to discharge it from his premises unreasonably and negligently, and with the obvious effect of committing a legal injury upon a third party. Time will, of course, be given to him to make arrangements for its disposal. How he disposes of it is a matter with which the Court is not concerned, as was pointed out in the *Colney Hatch Case* (3).

That there is jurisdiction to grant an injunction seems to follow from the only two cases in which the question has arisen: *Gibbings* v. *Hungerford* (4) and *Graham* v. *Wroughton* (5). Defendant's counsel criticized *Gibbings* v. *Hungerford* (4), mainly because

(1) [1893] 2 Q. B. 135.
(2) [1909] A. C. 45, at p. 55.
(3) L. R. 4 Ch. 146.
(4) [1904] 1 I. R. 211.
(5) [1901] 2 Ch. 451.

FitzGibbon L.J., in the course of a long judgment, is said to have made a slip by referring to cases which were decided upon the special provisions of the Rivers Pollution Act as if they were authorities upon the question of common law liability. Be that as it may, the fact remains that the Court was unanimous in giving an injunction against the occupier upon the special facts of the case, which were explained by FitzGibbon L.J. at the bottom of page 219, and were mild as compared with the special facts of this case. In *Graham* v. *Wroughton* (1) Byrne J. gave an injunction against the occupier upon the ground that the defendant could not, in the circumstances, justify the use of a mere surface-water sewer for the conveyance of fæcal sewage. Collins L.J. did not differ from that view, but rested his judgment upon another ground. In the present case there is a great deal more at issue than the mere misuse of a sewer. The misuse of the sewer is only one of the circumstances of this case.

The plaintiff is, in my opinion, entitled to an injunction to restrain the defendant from discharging, or permitting to be discharged, fæcal sewage, or water polluted therewith, from the water-closets in his houses, or from his premises, so as to cause the same to flow or pass to plaintiff's lands, or to pollute the stream which runs through the same, or to cause a nuisance therein. I think he is also entitled, if he so desires, to an inquiry as to damages, and to costs of suit.

Solicitor for the plaintiff: *G. T. Harley.*
Solicitors for the defendant: *James Murland & Co.*

D. M. S.

(1) [1901] 2 Ch. 451.

M. R. 1917.

Feb. 21, 22. March 13.

THE COMMISSIONERS OF CHARITABLE DONATIONS AND BEQUESTS *v.* M'CARTAN AND OTHERS.

Will—Charity—Bequest "for establishing a monastery, or any other religious, ecclesiastical, or charitable institution"—Failure of gift.

A bequest to a trustee "for establishing a monastery or any other religious, ecclesiastical, or charitable institution which he in his absolute discretion shall think fit, or partly for such purpose or purposes, and partly for Masses for the repose of the souls of the testatrix's family," is not a good charitable bequest.

The will contained a provision whereby, in the event of any question arising as to the legality or validity of the devises and bequests, or if any such devise or bequest should be illegal or invalid, the testatrix gave, devised and bequeathed all her property to the trustee absolutely without any trust, condition, or obligation.

Held, that the charitable gift having failed, the property went to the trustee absolutely under the ultimate gift over.

In re Douglas, Obert v. *Barrow*, 35 Ch. D. 472, distinguished; *Hunter* v. *Attorney-General*, [1899] A. C. 309, followed.

ACTION.

By her will, dated the 21st May, 1874, Anna Magenis made the following disposition of her residuary estate:—"And as to the residue of my property, I give, devise and bequeath the same unto the Rev. William M'Cartan, P.P., for establishing a monastery in Ballyely, County Down, or any other religious, ecclesiastical, or charitable institution which he in his absolute discretion shall think fit, or partly for such purpose or purposes, and partly for masses for the repose of the souls of my family. I do not bind the said William M'Cartan to any time for the establishing of those charities, or for having those masses said, or the places or persons by whom, believing as I do that the said William M'Cartan will do what is right and just." In the event of any question arising as to the legality or validity of the devises and bequests in the will contained, or any of them, or if any such devise or bequest should be illegal or invalid, then, and in every such case, the testatrix devised and bequeathed all her property of every nature, kind and description whatsoever and wheresoever, to the said William M'Cartan, his heirs, executors and administrators,

according to the nature and quality thereof, absolutely, and without any trust, condition, or obligation of any nature or kind or description whatsoever, either express or implied.

The testatrix died on the 24th November, 1882, and probate of her will was granted on the 15th January, 1883, to Monsignor M'Cartan, one of the executors. The principal asset consisted of the lands of Ballyely, containing 428 acres, held under a lease for 999 years, at the yearly rent of £73 12*s.*; there was also a small farm called Kilmacrew, held as a yearly tenancy.

After the death of the testatrix, Monsignor M'Cartan entered into possession of the entire assets of the testatrix; in 1883 he sold the lands of Ballyely as executor for £2,500, and in 1889 repurchased them for a like sum, of which £1,500 was paid in cash, and £1,000 secured by a mortgage of the lands, dated the 13th March, 1889. Portions of this sum were paid off from time to time, and in 1916 the only incumbrance affecting the lands was a sum of £304 13*s.* 3*d.*, secured by a mortgage dated the 27th June, 1901, to the defendant, the Rev. Edward M'Cartan. In 1907 Monsignor M'Cartan filed an originating application in the Irish Land Commission for the sale of the tenanted portion of the lands of Ballyely, describing himself as absolute owner, the amount of the purchase-money to be advanced being £5,044. This sale was completed by his personal representative, and the lands were vested in the purchasing tenants on the 14th May, 1914.

By his will, dated the 21st February, 1903, Monsignor M'Cartan gave, devised and bequeathed to His Eminence Cardinal Logue and the Most Rev. Henry O'Neill, Bishop of Dromore, all his lands, with the buildings thereon, situate in the townland of Ballyely and County of Down, together with the rents, issues and profits thereof for a home for superannuated priests, and for the support of such home, subject to the payment of a sum of £2,000 as therein mentioned. Monsignor M'Cartan died on the 13th March, 1907, and his will was proved on the 1st May, 1907, by the Rev. Edward M'Cartan and Patrick Fitzgerald, his executors.

The plaintiffs, the Commissioners of Charitable Donations and Bequests, supported the claim of the charities mentioned in the

M. R. 1917.

COMMRS. OF CHARITIES v. M'CARTAN.

will of Anna Magenis; the defendants were the executors of the will of Monsignor M'Cartan, Thomas Dowdall, one of the next-of-kin of Anna Magenis, and Cardinal Logue, as surviving trustee under the will of Monsignor M'Cartan.

S. L. Brown K.C. and *Maxwell*, for the plaintiffs :—

The validity of the trust declared by the will of Anna Magenis depends upon whether the trustee could, without committing a breach of trust, apply any part of the property to purposes which are not charitable. Here not only the dominant but the expressed intention of the testatrix was charitable; she says :—"I do not bind the said William M'Cartan to any time for the establishing of those charities . . ."; "charities" means charities which are lawful. This view is strengthened by the introduction of an "O'Hagan clause," which shows that her only anxiety was lest the statute relating to a bequest of lands for a charitable purpose should invalidate the gift. The context here is stronger than in the will in *In re Douglas, Obert* v. *Barrow* (1). That the executor might have applied the bequest partly for masses does not make the testatrix's intention anything less charitable: *O'Hanlon* v. *Logue* (2). In *Arnott* v. *Arnott* (3) it was decided that a bequest for "religious purposes" means for religious purposes which are charitable; but here the testatrix herself has described her purposes as charitable. [They also referred to *Attorney-General* v. *Gladstone* (4).]

Serjeant Matheson K.C., *Rosenthal K.C.* (with them *Morgan Byrne*), for the defendant Thomas Dowdall :—

We support the argument of the plaintiffs that the bequest in the will of Anna Magenis was a valid charitable bequest, but the discretion committed by the testatrix to Monsignor M'Cartan was a personal discretion which could only be exercised by him; in so far as he did not exercise that discretion and deal with the property, it goes among the next-of-kin of the testatrix as undisposed of: Sugden on Powers, 8th ed., p. 131; *Down* v. *Worrall* (5).

(1) 35 Ch. D. 472.
(2) [1906] 1 I. R. 247.
(3) [1906] 1 I. R. 127.
(4) 13 Sim. 7.
(5) 1 My. & K. 561.

Serjeant Sullivan K.C., *M'Gonigal K.C.* (with them *J. M. Whittaker*), for the defendants the Rev. Edward M'Cartan and Patrick Fitzgerald, executors of the will of Monsignor M'Cartan:—

There is no valid charitable gift of all the property bequeathed to Monsignor M'Cartan; he might have applied portion of it to objects which are not legally charities. The words "religious, ecclesiastical, or charitable" should be read disjunctively: *Williams* v. *Kershaw* (1); *In re Sutton*, *Stone* v. *Attorney-General* (2). A gift to a monastery is not charitable: *Sims* v. *Quinlan* (3); *Cussen* v. *Hynes* (4); *Ellard* v. *Phelan* (5); *In re Greene*, *Fennelly* v. *Cheator* (6). Even if "monastery" be taken in its original significance as including a community of religious women, it is not a charity: *Cocks* v. *Manners* (7); *Dunne* v. *Byrne* (8). "Religious" purposes are not necessarily charitable: *O'Connell* v. *Commissioner of Valuation* (9). The fact that the testatrix speaks of "those charities" only shows that she thought that the objects she had mentioned were charitable: *Browne* v. *Yeale* (10). Where there is no over-riding charitable intention expressed, and the donee may select between objects which are and others which are not charitable, the whole gift fails: *Morice* v. *Bishop of Durham* (11); *Hunter* v. *Attorney-General* (12). *In re Douglas* (13) is distinguishable; there the Court held that there was an over-riding charitable intention, which was not invalidated by the mere suggestion by the testator of institutions which were not charitable as possible objects of his bounty.

Pigot K.C. and *Cusack*, for the defendant Cardinal Logue:—

There are three ways in which a valid charitable trust may be created—1, Where the testator names specific charitable objects; 2, where he names broad classes of charitable objects generally; and 3, where there is an over-riding charitable intention clearly expressed. Where there is no expression of charitable intention,

(1) 5 Cl. & F. 111.
(2) 28 Ch. D. 464.
(3) 17 Ir. Ch. Rep. 43.
(4) [1906] 1 I. R. 539.
(5) [1914] 1 I. R. 76.
(6) [1914] 1 I. R. 305.
(7) L. R. 12 Eq. 574.
(8) [1912] A. C. 407.
(9) [1906] 2 I. R. 479.
(10) 7 Ves. 50*n*.
(11) 10 Ves. 522.
(12) [1899] A. C. 309.
(13) 35 Ch. D. 472.

M. R. 1917.

COMMRS. OF CHARITIES v. M'CARTAN.

the inclusion of one or more non-charitable objects vitiates the entire gift. Here the attempted charitable disposition has failed, and the property passed to Monsignor M'Cartan absolutely, and is now subject to the trusts of his will. [They referred to *Morice* v. *Bishop of Durham* (1); *Hunter* v. *Attorney-General* (2); *In re Jarman's Estate, Leavers* v. *Clayton* (3); *O'Meara* v. *Attorney-General* (4); *Grimond* v. *Grimond* (5).]

Maxwell, in reply:—

The use of the words "those charities" either discloses an over-riding charitable intention on the part of the testatrix, or limits the classes enumerated to such of them as may be legally charitable. "Religious" objects are prima facie charitable: *Arnott* v. *Arnott* (6). The Court or a trustee in carrying out the trust will discard any object which is illegal or prohibited by law: *In re Piercy, Whitwham* v. *Piercy* (7). In *In re Salter, Rea* v. *Crozier* (8), it was held that a gift for "charitable or religious" purposes was a valid charitable gift.

Cur. adv. vult.

March 13.

O'CONNOR M.R.:—

In this action there are conflicting claims arising under the respective wills of a deceased lady named Anna Magenis, and a deceased clergyman, Monsignor William M'Cartan. The testatrix and testator left their respective estates for charitable purposes. Subject to the trusts declared by the will of Anna Magenis, Monsignor M'Cartan was her residuary devisee and legatee. He survived her, and it is contended in the interest of his estate that the trusts declared by the will of the testatrix failed, and that he became the beneficial owner of her residuary estate, which then became subject exclusively to the trusts of his will. The contest is, therefore, between two sets of charities. The charities favoured by Anna Magenis have the prior claim so far as the estate of Monsignor M'Cartan was derived from her.

(1) 10 Ves. 522.
(2) [1899] A. C. 309.
(3) 8 Ch. D. 584.
(4) [1913] 1 I. R. 276.
(5) [1905] A. C. 124.
(6) [1906] 1 I. R. 127.
(7) [1898] 1 Ch. 565.
(8) [1911] 1 I. R. 289.

The plaintiffs in the action are the Commissioners of Charities. The defendants, the Rev. Edward M'Cartan and Patrick Fitzgerald, are the personal representatives of both the testatrix and testator, and as such have conflicting interests. Thomas Dowdall, a next-of-kin of the testatrix, is another defendant, because, on a certain view which was put forward, there would be a partial intestacy as to her assets, and His Eminence Cardinal Logue has also been made a defendant, because he is a trustee of the charity claiming under Monsignor M'Cartan's will, and is interested in his estate only.

The Commissioners support the claim of the charities mentioned in the will of the testatrix, while the executors and Cardinal Logue support those mentioned in the will of the testator. I am satisfied, therefore, that I have both interests sufficiently represented.

By the will of Anna Magenis, dated the 21st May, 1874, she devised and bequeathed all her estate, real and personal, to Monsignor M'Cartan, subject to a paramount trust for the support of her mother (who died many years ago), upon trust after the mother's death, as to the house in which the testatrix resided, and the furniture and other articles therein, and the farm which she occupied, and also a farm called Kilmacrew, for Monsignor M'Cartan during his life; and as to the residue of her property she devised and bequeathed the same to him for establishing a monastery in Ballyely (which was the testatrix's residence), or any other religious, ecclesiastical, or charitable institution which he, in his absolute discretion, should think fit; or partly for such purpose or purposes, and partly for masses for the souls of her family; and she declared by her will that she did not bind Monsignor M'Cartan to any time for the establishing of those charities, or for having those masses said, or the places or persons by whom, believing as she did that he would do what was right and just. She then gave him a discretionary trust to provide for certain of her relatives, without imposing any obligation upon him; and then declared that in the event of any question arising as to the legality or validity of the devises and bequests thereinbefore contained, or any of them, or if any of such devises or bequests should be illegal or invalid,

M. R. 1917.

COMMRS. OF CHARITIES *v.* M'CARTAN.

then, and in any such case, but subject always to the trust in favour of her mother, she gave, devised, and bequeathed all her property, of every kind and description whatsoever and wheresoever, to the said Monsignor M'Cartan absolutely and without any trust, condition, or obligation of any nature or kind or description whatsoever, either express or implied; and she appointed James Quinn and the said Monsignor M'Cartan her executors.

The testatrix died on the 24th November, 1882, and her will was proved on the 15th January, 1883, by Monsignor M'Cartan, power being reserved to make a like grant to James Quinn when he should apply for the same. The latter gentleman never applied for a grant. Monsignor M'Cartan went into possession of the entire assets of the testatrix, and treated them as his own. He did not carry out any of the pious or charitable trusts imposed on him by the will. The principal asset consisted of the lands of Ballyely, on which the testatrix had her residence, and which was held for a term of 999 years subject to the yearly rent of £73 12*s*. Monsignor M'Cartan sold these lands as executor in the year 1883 for the sum of £2500, and some years afterwards bought them back for a like sum; and a question arose as to whether these lands did not again become assets on the re-purchase by the executor, but in the circumstances nothing turns on this transaction.

By his will, dated 21st February, 1903, Monsignor M'Cartan devised and bequeathed to Cardinal Logue and the Most Reverend Henry O'Neill, Bishop of Dromore, the lands of Ballyely with the buildings thereon for a home for superannuated priests and for the support of such home, subject however to the payment of a sum of £2000 as therein mentioned. I need not further state the contents of this will, because the questions raised in the action are only conversant with the lands of Ballyely and the proceeds of the sale thereof. If Miss Anna Magenis left other assets it is admitted that they are of a negligible quantity and may be disregarded. Monsignor M'Cartan appointed the defendants, the Reverend Edward M'Cartan and Patrick Fitzgerald, executors of his will. He died on the 13th March, 1907, and probate was granted to the executors on the 1st May, 1907. Monsignor

M'Cartan had in his lifetime instituted proceedings for the sale of the lands of Ballyely under the Land Purchase Acts. These proceedings were continued by his executors, and the purchase-moneys now lie to the credit of the matter in the Court of the Irish Land Commission. This money is the subject of the present action. The Commissioners of Charities claim that it is impressed by valid charitable trusts declared by the will of Anna Magenis. The defendant, Thomas Dowdall, as a next-of-kin, contends that in the events which happened the charitable trusts failed, and that she died intestate as to her residuary estate which included the lands. The defendants, the Reverend Edward M'Cartan and Patrick Fitzgerald, as executors of Monsignor M'Cartan, and Cardinal Logue, as his trustee, claim that the lands and the proceeds of sale thereof became the absolute property of Monsignor M'Cartan and subject to the trusts declared by his will.

The primary question is—Was there a valid charitable trust declared by the will of Anna Magenis? The trust was "for establishing a monastery or any other religious, ecclesiastical, or charitable institution which Monsignor M'Cartan in his absolute discretion should think fit, or partly for such purpose or purposes and partly for masses for the repose of the souls of (the testatrix's) family." Having declared the trust in this way—the testatrix then said—"I do not bind the said William M'Cartan to any time for the establishing of those charities, or for having those masses said, or the places or persons by whom, believing as I do that the said William M'Cartan will do what is right and just." Monsignor M'Cartan never exercised the discretion reposed in him. He died without executing the trust, and apparently considered that he had absolute disposing power over the property. But a charitable trust can never fail for want of a trustee, or through the default of a trustee. It can always be carried out by the Court.

Was there a binding charitable trust in this case? Monsignor M'Cartan's executors and trustees say that there was not, because the purposes declared were not all charitable, and it was open to Monsignor M'Cartan to select a non-charitable purpose. It is said that the establishment of a monastery is not a charitable

M. R. 1917.

COMMRS. OF CHARITIES *v.* M'CARTAN.

purpose, because a monastery is not necessarily an institution devoted to works of charity such as the education of poor children or the nursing of the sick poor. This is undoubtedly so, because monasteries of men and women are often, if not mostly, institutions the members of which devote their lives exclusively to acts of piety such as pious meditation, prayer and self-denial. Such institutions, however praiseworthy, are not charitable in the sense recognized by this Court. It is urged, too, that the religious and ecclesiastical institutions mentioned in the will are not necessarily charities, and perhaps this is so, but there are authorities to the effect that a religious purpose is prima facie charitable. It is not, however, necessary to determine this, because if there is any one of the purposes non-charitable, that may determine the only question of importance in this case.

It is admitted by the plaintiffs that a monastery is not necessarily a charity, but it is contended that on the true construction of the will it was only such a monastery as would be a good charity that the testatrix intended to have established, *i.e.* a convent of nuns who had taken monastic vows, and whose rules enjoined the education of the poor and visiting the sick poor. In support of this construction the concluding words which I have already read are relied upon—"I do not bind the said William M'Cartan to any time for the establishing of those charities." "Those charities," of course, mean the purposes previously declared, and it is said that the use of these words stamps them all with the character of charity in the legal sense. I have no doubt that the testatrix thought that all the purposes mentioned were charities, but did she use the word in its legal sense or in the sense that would cover a purely pious donation? Many people would describe a gift to a monastery of Carmelites, or any other religious order which is dependent upon alms for support, as a charity. This case is by no means the same as *In re Douglas, Obert* v. *Barrow* (1), which Mr. Brown so strongly pressed on me. In that case there were very strong indications that the testatrix referred to charities in the legal sense. She gave certain legacies of a non-charitable character, and directed that for the payment

(1) 35 Ch. Div. 472.

of these legacies recourse should be had in the first instance to such part of her personal estate as could not lawfully be appropriated by will to the charitable bequests she had thereinafter made. Now that was a highly technical provision, showing an acquaintance with the law of charities. Then she went on to direct that out of such part of her personal estate as the law permitted to be appropriated by will to charitable purposes certain legacies should be paid to certain societies and institutions which the Court held to be charitable. So that the testatrix provided with the skill of an accomplished draftsman for marshalling her assets so as to have her pure personal estate rendered available for the payment of her charitable legacies. She then gave the residue, which should remain after payment, of that portion of her personal estate which might by law be appropriated by will for such purpose among such charities, societies, and institutions (including or excluding those which she had already mentioned as might be preferred) and in such shares and proportions as the Earl of Shaftesbury should nominate, and in default of such nomination as her trustees should determine. It was argued that this final gift was bad on the principle laid down in *Morice* v. *Bishop of Durham* (1). It was said that the residue was not bound by a charitable trust, because the whole or any part of it might have been applied to any society or institution whether charitable or non-charitable, and that the purposes were therefore so indefinite that the trust could not be enforced by the Court. It was held, however, by Mr. Justice Kay, and afterwards by the Court of Appeal, that the societies and institutions referred to in the will were charitable societies and institutions. This decision was arrived at by a consideration of the whole will, and particularly of the provisions for marshalling to which I have called attention. These provisions satisfied the Courts that the overriding idea in the mind of the testatrix was charity, and charity in the sense which is understood in the administration of charitable trusts by courts of Equity.

In the will before me I have nothing to show whether when the testatrix provided for the establishment of a monastery, even though she referred to all the objects of her bounty as charities,

(1) 9 Ves. 399; 10 Ves. 522.

M. R. 1917.

COMMRS. OF CHARITIES *v.* M'CARTAN.

she was actuated by a pious purpose or a purpose charitable in the legal sense. Prima facie a monastery (I leave out of sight altogether the penal clauses of the Catholic Relief Act) whether for men or women is not charitable. No one could say that if Monsignor M'Cartan had established a monastery of Carmelite nuns he had done violence to the wishes of the testatrix. There are by no means in her will such indications, as were found in *Re Douglas* (1), that the overriding idea was charity in the legal sense.

In *In re Hunter, Hood* v. *Attorney-General* (2) (in the House of Lords sub nom. *Hunter* v. *Attorney-General* (3)) the testator declared that his residuary estate or so much thereof as should be legally applicable to charitable purposes should be transferred to special trustees in trust to apply the income or any portion of the capital in grants for or towards the purchase of advowsons or presentations, or in creating or contributing to the erection, improvement, or endowment of churches, chapels, or schools, or in paying or contributing to the salaries or income of rectors, vicars, or incumbents, masters, or teachers on certain conditions framed with a view to promote true Protestant and Church of England principles of an evangelical character. It was admitted that all the testator's objects save the purchase of advowsons and presentations were charitable, and it was contended by the Attorney-General that on the true construction of the will, reading it in its entirety, the purchase of advowsons was for a charitable purpose. The House of Lords, reversing the Court of Appeal and setting up the judgment of Romer J., held that the gift for the purchase of advowsons was not charitable, and that the whole gift failed on the principle laid down in *Morice* v. *Bishop of Durham* (4). It was contended in *Hunter* v. *Attorney-General* (3) as in the present case, that the testator manifested a charitable intention which overrode all the bequests and controlled them, but that argument did not prevail. The judgments are much in point, because the portion of the personal estate of the testator which was appropriated to the trusts (including the trust for the purchase of advowsons) was only so much thereof as should be legally

(1) 35 Ch. D. 472.
(2) [1897] 1 Ch. 518.
(3) [1899] A. C. 309.
(4) 9 Ves. 399; 10 Ves. 522.

applicable for charitable purposes. The testator therefore thought that the purchase of advowsons was a charitable purpose, but this was not enough to make it charitable in the legal sense. On this point here is what Romer J. says (1) :—"It may be conceded that the testator thought the objects he indicated in his will were all charitable, and some are undoubtedly charitable, but the testator's opinion of course will not make the gift good if the first object specified is really not charitable." This aptly describes the present case. The testatrix spoke of the objects of her bounty as charities. She thought that they were charities, but that did not make them so. In *Hunter* v. *Attorney-General* (2) the testator was declared to have died intestate as to the entire residue of his personal estate. The case was held to come within the principle of *Morice* v. *Bishop of Durham* (3), that where a bequest is for charitable purposes and also for purposes of an indefinite nature not charitable, and no apportionment of the bequest is made by the will, so that the whole might be applied for either purpose, the whole bequest is void. It is enough for me to say that if that principle governs *Hunter* v. *Attorney-General* (2), a fortiori it governs the present case. The objects of the bounty of Miss Anna Magenis are, if anything, more indefinite than those described in the will of Edward Hunter. I must therefore hold that the trusts declared by the will for the purposes I have mentioned are invalid, with the result that the property went absolutely to Monsignor M'Cartan under the ultimate gift over contained in the will.

The judgment will contain a declaration that the trust for establishing a monastery or any other religious, ecclesiastical, or charitable institution which the Rev. William M'Cartan in his absolute discretion should think fit, or partly for such purpose or purposes, and partly for masses, is invalid; and that the residuary real and personal estate of Anna Magenis passed to the said William M'Cartan absolutely.

The action, so far as it claims the administration of the assets of Anna Magenis, is dismissed.

As to the claim for the administration of the estate of Monsignor M'Cartan, there will be a declaration that, as it

(1) [1897] 1 Ch., at p. 521. (2) [1897] 1 Ch. 518; [1899] A. C. 309.
(3) 9 Ves. 399; 10 Ves. 522.

M. R. 1917.

COMMRS. OF CHARITIES *v.* M'CARTAN.

appears that the charitable trust declared by his will is being properly administered, and that a scheme for carrying out same has been framed under the sanction of this Court, no order is necessary at present.

I must now deal with the costs of the action. The plaintiffs have failed in their claim against the estate of Anna Magenis, and no costs can be given out of her assets. But the action was as much conversant with the administration of Monsignor M'Cartan's assets as hers. His estate and the property available for his charity could not be ascertained without some action brought either by the Commissioners, or by the executors against the Attorney-General. I will, therefore, declare that the costs of all parties are payable out of the assets of Monsignor M'Cartan, his executors to have their costs as executors' costs, and Cardinal Logue his costs as trustee's costs.

All parties to have liberty to apply.

Solicitor for the Commissioners of Charitable Donations and Bequests: *J. M. Maxwell.*

Solicitor for the defendants the Rev. E. M'Cartan and Patrick Fitzgerald: *Hugh Hayes.*

Solicitor for the defendant Thomas Dowdall: *James H. Murphy.*

Solicitor for the defendant Cardinal Logue: *Alexander Gartlan.*

A. H. W.

ATTORNEY-GENERAL *v.* DUBLIN CORPORATION.

(1917. No. 109.)

M. R.
1917.
March 22, 23, 28.
Appeal.
May 7, 8.
June 2.

Dublin Police District—Police Rate—Apportionment between county borough and outside area—Local Government (Ireland) Act, 1898 (61 & 62 *Vict. c.* 37), *sect.* 65, *sub-s.* 2, *sect.* 66.

Under the Dublin Police Acts, as amended by the Local Government (Ireland) Act, 1898, sect. 66, sub-ss. 2 and 4, the Commissioner of Police is entitled to raise for the maintenance of the police force an amount not exceeding eight pence in the pound on the annual value of the rateable hereditaments in the police district, which is apportionable between the city of Dublin and the rest of the district according to rateable value.

Pursuant to sect. 65, sub-s. 1, of the Local Government (Ireland) Act, 1898, a revaluation of the county borough of Dublin was made by which the total valuation of the rateable hereditaments in the borough was largely increased. This revaluation came into force on April 1st, 1916.

Held, by the Court of Appeal (Sir Ignatius O'Brien L.C. and Molony L.J., Ronan L.J. dissenting), affirming the decision of the Master of the Rolls, that sect. 65, sub-s. 2, of the Local Government (Ireland) Act, 1898, applied to the police district as if it was a union; that following the decision of the Court of Appeal in *Belfast Guardians* v. *Belfast Corporation* (*No.* 1), [1910] 2 I. R. 534, the word "at" in sect. 65, sub-s. 2, was to be construed as meaning "before," not "after"; and that, therefore, the estimate and apportionment made in March, 1917, should have been made on the old valuation.

TRIAL OF ACTION.

The following statement is taken from the statement of claim:—

By the Dublin Police Act, 1836 (6 & 7 Wm. 4, c. 29), provision was made establishing a new and more efficient system of police within the limits of the police district of Dublin Metropolis. The said Act empowered the Lord Lieutenant by warrant under his hand and seal to appoint two fit persons as justices of the peace for and of the said police district: and by the 24th section of the said Act the said justices were authorized to raise and levy the like rates and assessments on all houses and tenements within

M. R. 1917.

ATTORNEY-GENERAL *v.* CORPORATION OF DUBLIN.

the said police district as were theretofore authorized to be collected, raised, assessed, and levied.

By the Dublin Police Act, 1837 (7 Wm. 4 & 1 Vict. c. 25), sect. 4, it was enacted as follows:—"And whereas it is expedient to provide for the more just and equal assessment of all houses, lands, and tenements in the said districts (meaning the police district of Dublin Metropolis) towards the maintenance of the said police, and for the purposes of the said Acts and this Act; be it therefore enacted that it shall and may be lawful for the said justices appointed under the said first recited Act of the last session of Parliament (that is the said Act (6 & 7 Wm. 4, c. 29)) to raise and levy from time to time, on all houses, lands, and tenements situate and being within the said district such rates or taxes as they shall from time to time find necessary for the maintenance of the said police, and the several purposes of the said Acts and this Act; provided that the sum or sums to be so raised and levied shall not exceed in the whole in any one year eightpence in the pound on the annual value of such houses, lands, and tenements; and the said justices shall from time to time as they find occasion by warrant under their hands appoint one or more proper person or persons to rate and assess all such houses, lands, and tenements to such rate as shall from time to time be fixed and determined by the said justices, not exceeding the amount of eightpence in the pound, according to the full and fair annual value thereof: and every such assessor or assessors shall, within forty days after the delivery to him or them of the warrant of his or their appointment, deliver to the said justices an assessment for each place named in such warrant, which assessment shall specify the names of the several owners or occupiers of the respective houses, lands, and tenements comprised in such assessment, the full and fair annual value of the same, and the amount of police tax chargeable thereon respectively."

By the 12 & 13 Vict. c. 91 the powers of applotting, levying, and collecting the police rate were vested in the Collector-General of Rates for the city of Dublin. By sect. 30 of the said Act the said justices appointed as aforesaid were authorized to estimate the amount necessary for the maintenance of the police force for twelve months next following the first day of January in each

year, such estimate to be transmitted to the Collector-General, and the said Collector-General was thereby authorized to applot, levy, and collect the money therein mentioned in the same manner as the other rates in said Act mentioned. Such amount to be raised not to exceed an amount of a rate of eightpence in the pound. The said justices were in subsequent Acts denominated Commissioners of Police, and by 22 & 23 Vict. c. 52, sect. 2, it was provided that henceforth there should be a Chief Commissioner of Police assisted by an Assistant Commissioner.

The Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37, sect. 66, sub-s. 10), abolished the office of Collector-General of Rates. By sect. 66 of the said Act it was provided as follows:—

By sub-sect. 2. "The Commissioner of Police of Dublin Metropolis under the Dublin Metropolis Police Acts shall, at the prescribed time before the beginning of every local financial year, estimate the amount of money which he finds necessary for the maintenance of the police force, and for the several purposes of the said Acts during that year, not exceeding the amount which the Commissioner is, under the said Acts, or any of them, entitled to raise by a rate thereunder."

By sub-sect. 4. "The Commissioner . . . shall apportion the amount so estimated between the city of Dublin and the rest of the police district of Dublin Metropolis; . . . and shall so apportion according to rateable value, and shall send to the council for the city of Dublin a demand for the amount apportioned to that city, and to the council of the county of Dublin a demand for the amount apportioned to the rest of the police district . . . and each council shall pay by equal half-yearly payments the amount specified in such demand, less five per cent. as and for the cost of collection and irrecoverable rates and office expenses, and also less such sum (if any) as the Local Government Board certify in each half-year to be the proportion of the Collector-General's annuity hereinafter mentioned properly chargeable against any such payment."

By sub-sect. 5. "The council of the city of Dublin shall raise either by means of a separate rate or by means of the poor rate, but as a separate item thereof, a sum equal to the amounts specified in such demand, but the demand note shall specify

M. R. 1917.

ATTORNEY-GENERAL v. CORPORATION OF DUBLIN.

approximately the amount in the pound required for each amount."

By sub-sect. 6. "A sum equal to . . . the amount specified in such demand on the county council of the county of Dublin shall be raised in manner provided by this Act with respect to a railway or harbour charge; but a council in lieu of raising the amount required to meet the same by means of the poor rate may, if they think fit, raise it by levying a separate rate."

The police district comprises the city of Dublin and portion of the county of Dublin; the limits of it are defined by the Dublin Police Acts of 1837 and 1839. By sect. 65, sub-s. 1, of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), it was enacted as follows:—"A general revaluation of rateable hereditaments under the Valuation Acts may be made as respects a county borough and on the application of the council, and the county so applying shall pay such portion, not exceeding one-half, of the costs of the revaluation as the Treasury direct, and upon any such general revaluation the land in the borough shall be valued in the manner directed by sect. 11 of the Valuation (Ireland) Act, 1852, with respect to houses and buildings."

The city of Dublin was revalued, and on the 1st day of April, 1916, the revaluation came into force. As a result the valuation of the city was largely increased.

By sect. 65, sub-ss. 2, 3, of the said Act, it was enacted as follows:—"2. Where part of a union is within and part without any county borough in respect of which a revaluation is made under this section, the total amount to be raised for union charges in that union shall be apportioned between each such part of the union in proportion to the rateable value of each part at the date when the revaluation under this section came into force: Provided that after the expiration of five years from that date, if no general revision has meantime been made, the Commissioner of Valuation, if satisfied by the council of the borough or the guardians representing the electoral division of the union situate outside the borough or a majority of them, that the apportionment has become inequitable by reason of subsequent changes in the value of any hereditaments in the union, may revise the proportion in which the union charges are to be apportioned. This enactment shall

apply to the police district of Dublin metropolis and to the Dublin bridge area within the meaning of the Dublin Port and Docks Board and Bridges Act, 1876, as if were a union, but with the substitution of the county council of the county of Dublin, with respect to the revision of the apportionment, for the said guardians. In this section the expression 'general revaluation' means a general revision under sect. 34 of the Valuation (Ireland) Act, 1852."

By sect. 43 of the said Act of 1898 it was enacted as follows:—"Notwithstanding anything in any Act, all expenses of the guardians of a union shall be raised equally over the whole union, and shall be called union charges, and where a union is divided between more than one county the total amount to be raised over the union shall be apportioned between each divided part in proportion to rateable value, and the amount so apportioned to a divided part shall be raised equally over that part as if it were a separate union."

In consequence of the said revaluation of the city a rate of eightpence in the pound on the present annual value of the houses, lands, and tenements in the said police district will yield a much larger amount than the same rate on the pre-revaluation value of the said houses, lands, and tenements.

The amount required for the maintenance of the said police force of Dublin metropolis for the coming year will be a sum largely in excess of the amount of a rate of eightpence in the pound on the present annual value of the houses, lands, and tenements in the said police district; and it will be necessary to make a demand for the full amount of a rate of eightpence in the pound on the present annual value to be levied and raised on the said police district in accordance with the provisions of sect. 4 of the Dublin Police Act, 1837, towards the maintenance of the said police force.

The defendants contend that, in consequence of the operation of sect. 65 of the Local Government (Ireland) Act, 1898, no portion of the said police district is bound to contribute towards the maintenance of the said police force a larger amount than a rate of eightpence in the pound on the annual value of the houses, lands, and tenements in each such portion at the date immediately

M. R. 1917.

ATTORNEY-GENERAL v. CORPORATION OF DUBLIN.

before the revaluation of the city of Dublin came into force; and that any excess of a rate of eightpence in the pound on the present annual value of the said police district over a similar rate on the pre-revaluation value of the same district is irrecoverable, and cannot be assessed or levied on the said district.

The plaintiff claimed a declaration as follows :—

1. That the Commissioner of Police of Dublin Metropolis, if the amount of his estimate in any year for the maintenance of the police force amounts to or exceeds an amount producible by a rate of eightpence in the pound on the poor law valuation of the Dublin metropolitan police district, is entitled to demand and to have raised and levied and to receive every such year the amount of a rate of eightpence in the pound on the annual value of the houses, lands, and tenements in the said district.

2. That the said amount to be raised by the said rate is to be henceforward calculated on and having regard to the increased valuation of the said police district caused by the revaluation of the city of Dublin.

3. That the amount of the said rate, if so estimated to be necessary, is to be apportioned between the city and the portion of the said police district outside the city of Dublin in proportion to the rateable value of each at the time immediately after the revaluation of the city came into force.

4. Alternatively that the said apportionment is to be made in accordance with the decision in *Belfast Poor Law Guardians* v. *Lord Mayor, Aldermen, and Burgesses of Belfast* (1).

5. That the city, and the portion of the said police district outside the city, are bound to pay the said several amounts so apportioned between them, in full, notwithstanding that, in consequence of such apportionment, either portion of the said police district may have to contribute an amount towards the said estimate in excess of a rate of eightpence in the pound levied on such portion, while the other portion of the said police district may have to contribute an amount less than a rate of eightpence in the pound levied on such other portion.

(1) [1910] 2 I. R. 534.

6. Alternatively that the said Commissioner is entitled, until there shall have been a revaluation of the portion of the said police district outside the city, to apportion the total estimate of the amount he shall find necessary for the maintenance of the police force, without regard to the limitation of the rate of eightpence in the pound, between the city and the portion of the said police district outside the city, and grade down the respective amounts so apportioned to the amount of a rate of eightpence in the pound on the valuation of the said respective portions of the said police district on which the said amounts were apportioned.

The Dublin Corporation by their statement of defence submitted and contended as follows:—

The amount of the estimates of the Commissioner of Police of Dublin Metropolis which he can demand to have raised and levied by a rate of the Dublin metropolitan police district should be calculated on, and having regard to the valuation of the said district existing immediately prior to the date when the revaluation of the city of Dublin came into force.

That the amount of the said estimate which is to be raised and levied by such rate should be apportioned between the city of Dublin and the portion of the said police district outside the city in proportion to the rateable value of each at the time immediately prior to the date when the revaluation of the city of Dublin came into force.

That on the true construction of said statutes, the Commissioner of Police of Dublin Metropolis is not entitled to estimate and demand for the maintenance of the police force for the year 1917–1918 a sum in excess of eightpence in the pound, calculated on the rateable value of said police district immediately before the revaluation of the city of Dublin came into force.

That the amount of the said estimate so to be raised and levied by a rate should be raised equally over the entire Dublin metropolitan police district.

That the portion of the Dublin metropolitan police district within the city of Dublin cannot in any event be legally required to raise and pay as a contribution towards the expenses of the maintenance of the Dublin metropolitan police, whether directly

M. R. 1917.

ATTORNEY-GENERAL v. CORPORATION OF DUBLIN.

or indirectly, and whether to the Commissioner of Police or to any other person or body, an amount exceeding the sum produced by a rate of eightpence in the pound on the existing annual value of the houses, lands, and tenements within the city immediately prior to the date on which the revaluation came into force.

The county council of the county of Dublin by their statement of defence submitted as follows:—

That on the true construction of the said statutes, the amount payable by the portion of the said police district outside the city of Dublin towards the maintenance of the police force cannot in any event exceed a sum of eightpence in the pound levied on all houses, lands, and tenements situate and being within the said portion of the said district according to the full and fair annual value thereof.

That it was the true intent and meaning of the said statutes that the sum to be raised and levied within the said police district for the maintenance of the police force should be raised and levied justly and equally over the said district.

That on the true construction of the said statutes, the amount which the Commissioner of Police of Dublin Metropolis is entitled to estimate and demand for the coming year for the maintenance of the police force cannot exceed a sum of eightpence in the pound calculated on the rateable value of the said police district immediately before the revaluation of the city of Dublin came into force.

If it should be held that the Commissioner of Police is entitled to estimate and demand a sum not exceeding eightpence in the pound calculated on the rateable value of the said police district immediately after the revaluation of the city of Dublin came into force, the large increase in the said sum which the Commissioner of Police is entitled to estimate and demand will be due to the increased rateable value of the city of Dublin, and not to the increased expense of the maintenance of the said police force. In these circumstances it would be contrary to the true intent and meaning of the said statutes and to natural justice to throw upon the portion of the said police district outside the city of Dublin an increase of the sum payable to the Commissioner

of Police which is due to the increased valuation of the city of Dublin.

In the alternative, and if it should be held that the said Commissioner of Police is entitled to estimate and demand a sum not exceeding the sum of eightpence in the pound calculated on the rateable value of the said district immediately after the revaluation of the city of Dublin came into force, then these defendants will submit that the decision in *Belfast Poor Law Guardians* v. *Lord Mayor, Aldermen, and Burgesses of Belfast* (1), is inapplicable to this case, and that, on the true construction of the said statutes, the sum estimated and demanded by the said Commissioner of Police should be apportioned between the city of Dublin and the portion of the said police district outside the city of Dublin in proportion to the rateable value of each immediately after the revaluation of the city of Dublin came into force.

The action came on for trial before the Master of the Rolls on March 22nd and 23rd, 1917. The only evidence was documentary, and consisted of certificates of valuation, estimates and demands for police rate, and correspondence. It appeared from these that on March 7th, 1917, the Commissioner of Police sent to the town clerk of the Dublin Corporation and to the secretary of the council of the county of Dublin an estimate of the amount of the police rate required for the financial year from April 1st, 1917, to March 31st, 1918; and demanded that the necessary steps be taken to collect and pay the same to him in equal half-yearly instalments, not later than June 1st next and December 1st next, as provided by the Local Government (Ireland) Act, 1898, and General Order of the Local Government Board of July 7th, 1899.

The estimate was as follows:—

Amount required, £54,956 15*s.* 4*d.*; apportionment payable by the council of the city of Dublin, less 5 per cent. costs of collection, &c. (rateable value of area being £1,121,644 6*s.*), £37,388 2*s.* 10*d.*; apportionment payable by the council of the County of Dublin, less 5 per cent. costs of collection, &c. (rateable value of area being £527,058 15*s.*), £17,568 12*s.* 6*d.*

(1) [1910] 2 I. R. 534.

M. R. 1917.

ATTORNEY-GENERAL *v.* CORPORATION OF DUBLIN.

The rateable values here mentioned were the rateable values then in force after the general revaluation of the city came into force. The rateable values of the city and county immediately before the general revaluation of the city came into force were—city, £1,001,374 12*s.*; county, £524,265, the increase in the valuation of the city amounting to £120,269 14*s.*

Serjeant Sullivan K.C. (*Pigot K.C.* and *S. J. Devitt* with him), for the plaintiff :—

The amount of the Dublin police rate to be paid by the Dublin metropolitan police district each year is a gross sum equal to a sum of eightpence in the pound on the then rateable value of all the houses, lands, and tenements in that district. Eightpence in the pound is the maximum rate, but that sum has always been required, and the cost of maintenance of the police force, in fact, exceeds that sum. 2. The Corporation and the County Council have to settle between them a question which arises under sects. 65 and 66 of the Local Government (Ireland) Act, 1898, viz., the amount of the rate which is to be paid by the two contributory areas within the district. The result may be that the area outside the city may have to pay more than eightpence in the pound, and the city area less than eightpence. That will depend on whether the police rate is a union charge within sect. 65, sub-s. 2, of the Act of 1898, and on the application of the decision of the Court of Appeal in *Belfast Guardians* v. *Belfast Corporation* (1). The Court of Appeal there held, affirming the decision of the King's Bench Division, that the word "at" in sect. 65, sub-s. 2, was to be construed as meaning "before," and that the apportionment of the amount required to defray the charges of the Belfast Poor Law Union, which comprised the city of Belfast and portions of the counties of Antrim and Down, was to be made as regards the city on the basis of the valuation existing before the general revaluation came into force. It will be urged on behalf of the Corporation that the effect of sect. 65, sub-s. 2, was not merely to make the amount required apportionable on the basis of the old valuation of the city, but that the estimate of the amount required should also be on that basis, and

(1) [1910] 2 I. R. 534.

thus reduce the amount demandable from what it would be if it was, as we contend, based on the present annual value. We submit that such a contention is unfounded. If the *Belfast Case* (1) has any bearing on this case, it, though binding on this Court, may be reviewed in the Court of Appeal.

Sect. 4 of the Dublin Police Act of 1837 imposed a rate not exceeding eightpence in the pound on all houses, lands, and tenements in the district. The individual tenement is not the unit. Sect. 65, sub-s. 2, of the Act of 1898 does not limit or regulate the amount of any rate or charge; it only relates to apportionment. The *Belfast Case* (1) decided that in the case of true union charges the words "at the date" mean "before the date." Even if it thus limits the amount of union charges, we submit that the police rate is not a union charge. [O'Connor M.R. referred to *Dublin County Council* v. *Pembroke Urban District Council* (1) and *Dublin County Council* v. *Kilmainham Urban District Council* (2).] These cases only deal with the 5 per cent. deduction allowed by sect. 66, sub-s. 14. [He referred to sects. 43 and 66, sub-s. 6, of the Act of 1898.] The amount demanded is a little less than could have been demanded, as eightpence in the pound would produce £55,857 on the present valuation of the whole district. If the contention of the Corporation is correct, the result will be to put more than eightpence in the pound upon the county.

Clancy K.C. (*Carrigan K.C.*, and *Philip White* with him), for the Dublin Corporation:—

The case is really a simple one. Sect. 66, sub-s. 2, repeats the provisions of the earlier Acts, and directs the Commissioner of Police to estimate the amount necessary for the maintenance of the police force not exceeding eightpence in the pound, and by sub-s. 4 he is to apportion the amount so estimated between the city and the rest of the police districts according to rateable value, and send a demand for the amount apportioned to each. Sect. 65, sub-s. 2, prescribes how the apportionment is to be made, and that the police rate is to be treated as a union charge.

The effect of the *Belfast Case* (1) is that a union charge is to be apportioned between each part of the union in proportion to the rateable value of each part before the revaluation referred to

(1) [1910] 2 I. R. 534. (2) [1902] 2 I. R. 485, 495.

M. R. 1917.

ATTORNEY-GENERAL *v.* CORPORATION OF DUBLIN.

in sub-s. 1—that is in the present case a general revaluation of the city—came into force. [He referred to a copy of the judgment of Palles C.B. (unreported) in *Belfast Corporation* v. *Belfast Poor Law Guardians*, approved of by the Court of Appeal in *Belfast Guardians* v. *Belfast Corporation* (1).] If that decision applies, the Crown has no case. A revaluation of the city under sect. 65, sub-s. 1, was bound to result in an increase of the total valuation, as land in the city was to be valued in the same way as houses and buildings are valued under the Valuation Act, 1852 (15 & 16 Vict. c. 63, s. 11), viz. upon an estimate of their net annual letting value as therein defined, and it may well be that that was why sub-s. 2 was made to apply to the police district, so that an additional burden should not be thrown upon the city by reason of increase of the total valuation. The proviso in sect. 65, sub-s. 2, will enable the proportion in which the police rate has been apportioned to be revised, if, after the expiration of five years, subsequent changes in the value of any hereditaments have made it inequitable. The valuation of the whole area of the city is to taken as the basis of the estimate and apportionment. This is a taxing statute, and it must be construed strictly: *Partington* v. *Attorney-General* (2), per Lord Cairns, at p. 122.

Brown K.C. (*Timothy Sullivan* with him), for the council of the County of Dublin:—

Our contention is that the estimate and apportionment are to be made on the same valuation, namely the old valuation, or, if it should be held that the apportionment is to be made on the new valuation, that the estimate is to made on that also. Otherwise great injustice will be done, and a rate exceeding eightpence in the pound may be put upon the county. The *Belfast Case* (3) has no application to the police rate. The preamble to sect. 4 of the Dublin Police Act of 1837 may be looked at to throw light on the meaning of the section. It recites that it is expedient to provide for the more just and equal assessment of all houses, lands, and tenements in the police district, and it then enacts that a rate not exceeding eightpence in the pound

(1) [1910] 2 I. R. 534, 536 (note). (2) L. R. 4 H. L. 100.
(3) [1910] 2 I. R. 534.

on the annual value of such houses, lands, and tenements is to be raised. This section has been repealed by reason of the subsequent legislation, except the words "provided that the sum or sums to be so raised and levied shall not exceed in the whole in any one year eightpence in the pound on the annual value of such houses, lands, and tenements," but the other words of it point in the same direction. A limited rate of this kind differs necessarily from union charges, which are not limited. Under this Act the justices estimated and raised their own rate, so no question arose. This continued till the Collector-General's Act was passed in the year 1849. Sect. 29 of that Act empowered the Collector-General to applot the police rate for the whole of the Dublin police district. Section 30 preserved the power of the justices to estimate the amount of the police rate required, not exceeding the amount they were authorized to raise, namely, eightpence in the pound, and required the Collector-General to applot and collect the amount according to the regulations as to the other rates authorized in the Act. This referred to sects. 44 and 45, by which the rates were to be applotted, and all premises assessed, according to the poor law valuation. Thus there was no alteration of the police rate by the Act of 1849, but the Local Government Act of 1898 transferred the duty of collecting it from one authority, namely, the Collector-General, to two authorities, namely, the Corporation and the county council.

We adopt the argument on behalf of the Corporation that the rate is to be estimated and apportioned on the old valuation, both in city and county; but it does not affect the county, if the rate is estimated and apportioned on the present valuation in both. But if the rate is to be estimated upon the new valuation, the apportionment must be made on the same valuation, as the Legislature has said that the rate is to be made equally over the whole district.

Section 66 does not deal with union charges, which are dealt with by sect. 43. Sect. 66, sub-ss. 2, 4, and 5, deal with estimating, apportioning, and raising the police rate. The apportionment is to be according to "rateable value," which is defined by sect. 109 as meaning "when used in relation to any hereditaments or area, the annual rateable value under the Valuation Acts of such

M. R. 1917.

ATTORNEY-GENERAL *v.* CORPORATION OF DUBLIN.

hereditaments, or of all the hereditaments comprised in such area."

The difficulty in the case is caused by sect. 65, sub-s. 2. Subject to the meaning of "at" the words of this sub-section down to the end of the proviso are clear, and apply only to union charges; but the last clause creates the difficulty. It does not go on to say "as if the police rate was a union charge." Sect. 66, sub-ss. 3, 4, and 5, give similar power of estimating, apportioning, and raising the bridge tax, which was leviable by the Collector-General under the Dublin Bridge Act, 1854 (17 & 18 Vict. c. 22), in the same manner as the police rate; i.e. over the same area. So long as that was in operation, namely, till 1876, no apportionment was necessary, and it was levied off the whole area of the police district by the Collector-General. The Dublin Port and Docks Board Bridges Act, 1876 (39 & 40 Vict. c. lxxxv.) created a bridge rate for special purposes, and constituted a bridge area over which the bridge rate was to be levied, which included part of the county outside the police district. Sect. 47 made the bridge rate terminable; but it was still in existence in 1898, when the Local Government Act was passed, and, therefore, it was necessary to provide for the apportionment of the bridge rate inter alia; hence the provision in sect. 66, sub-s. 4, as to apportioning the rate between the different parts of the bridge area. The bridge rate has now ceased, but the bridge tax is in force, and the last clause of sect. 65, sub-s. 2, applies to apportionment of the bridge tax.

Carrigan K.C., for the Corporation:—

The last clause of sect. 65, sub-s. 2, applies to the police rate as well as to the bridge tax, and the estimate and apportionment is to be made on the old valuation, as decided in the case of union charges in the *Belfast Case* (1). It makes no difference that the police rate is limited in amount, while union charges are not.

Pigot K.C. in reply:—

Counsel for the defendants cannot point to anything in the Acts authorizing the raising of the police rate which directs

(1) [1910] 2 I. R. 534.

the estimate to be made on anything but the rateable value of the premises at the time; but they refer to sect. 65 as showing that this is not so. But that section does not touch this case. Union charges are not limited, as the police rate is. There is no mention of the bridge tax or the police rate. The police district of Dublin metropolis is mentioned because it is part of the bridge area, as defined by sect. 18 of the Act of 1876. The word "it" means the bridge area.

March 28.

O'CONNOR M.R.:—

In this action questions of very great importance have been raised as between the Crown and the Corporation of Dublin on the one hand and the Corporation and the county council of the County of Dublin on the other.

The Crown is entitled to demand from the police district of Dublin metropolis a sum not exceeding eightpence in the pound on the valuation of the district—an amount easily ascertained if the valuation is admitted. The Crown's demand is based on the existing valuation of the entire district. The Corporation disputes the demand on the ground that the basis of the estimate should be, as to that portion of the police district which is situate in the city, the valuation as it existed immediately prior to the date when the revaluation of the city came into force under the Local Government Act. This is an important question for the Corporation, because the revaluation resulted in a considerable increase in the rateable value of the city.

The question between the Corporation and the County Council is concerned with the apportionment of the total liability as between the two parts of the district, viz., the part within the city and the part situate in the county.

If the apportionment is made on the same basis as the estimate of the total liability, the county council makes no objection, because, whether the estimate is made on the new valuation of the city or the old one, the liability of the city council is the same. If the demand of the Crown is larger because the new valuation of the city is taken as the basis, the ratio between the new valuation of the city and the valuation of the county district saves the latter from any increase in the burden.

M. R. 1917.

ATTORNEY-GENERAL *v.* CORPORATION OF DUBLIN.

But one of the views put forward was that while the estimate of the total demand should be made on the basis of the new valuation of the city and the unchanged valuation of the county district, the apportionment between the city and county should be in the ratio of the old city valuation to the valuation of the county district. The result of this would be to impose a liability on the county district of more than eightpence in the pound on its total valuation. The rights and liabilities of the several parties depend upon a code of legislation, beginning with 1 Vict. c. 25 (the Dublin Police Act, 1837), and ending with 61 & 62 Vict. c. 37 (the Local Government (Ireland) Act, 1898).

The Act of 1837 defines the police district of Dublin metropolis, and gives power to the Lord Lieutenant in Council to extend it. Suffice it to say, that the police district, as now constituted, embraces the whole city, and a considerable part of the county of Dublin.

The important section is the fourth. [His Lordship read it.]

Before passing away from this section it may be observed that the purpose of the section, as expressly stated in the recital, was a just and equal assessment of all rateable tenements, while the enacting part authorized the levy of a rate for the maintenance of the police on all such tenements, with a limitation on the rate of eightpence in the pound. The clear meaning of this is that no rated occupier in the police district shall be under any greater liability than that of eightpence in the pound on his valuation. We thus commence with a taxing statute which limits the liability of the taxpayers. We next come to the 12 & 13 Vict. c. 91 (the Collection of Rates Act, 1849). By that Act a Collector-General of Rates was appointed for the collection of all rates leviable in the city, as also all rates partly leviable in the city and partly in the county of Dublin, including the police rate.

Section 30 of the Act deals specially with the police rate. It directs the Justices of the police district (whose place in this matter is now filled by the Commissioner of Police) to make an estimate of the police expenditure for the year, and to transmit it to the Collector-General, who is authorized and required to levy it according to the rules and regulations contained in the Act, with a proviso that the amount to be levied shall not exceed the amount

which might previously have been levied. Here is a distinct and clear recognition and re-enactment of the clause in the Act of 1837, which protected each individual ratepayer from any greater tax for police purposes than one at the rate of eightpence in the pound.

The 44th section of this Act provides for the mode of applotment of all rates to be collected by the Collector-General. They are to be levied on all rateable tenements equally according to net annual value as the same then were or should from time to time be thereafter valued and rated under the Act for the more effectual relief of the destitute poor in Ireland. All valuations are now made under the Valuation Act, 1852, but this does not affect the operation of the 44th section of the Collection of Rates Act, 1849. Such was the law regulating the amount and recovery of the police rate up to the date of the passing of the Local Government Act, 1898.

Before I proceed to deal with this Act, and the changes which it made, I have to notice two points which deserve attention. In the first place, before the Act there was no necessity for the Commissioner of Police when presenting his estimate to make any apportionment between the city and that part of the county which was in the police district. The entire amount was collected by one authority, and as it was levied on individual ratepayers according to valuation, an equable adjustment was worked out without any apportionment between districts. In the second place, the unit for the levy was the individual ratepayer, not the district in which he resided.

Let us see now what was accomplished by the Local Government Act so far as it affected the questions we are concerned with. The office of Collector-General was abolished, and every county borough and county council became the authority for the collection of all rates leviable within its jurisdiction. This necessitated a change in the ministerial work of the Commissioner of Police, because he had henceforth to recover the amount of his demand from two authorities instead of one as heretofore. That is, instead of applying to the Collector-General to raise the amount from the entire police district, he had to apply to the Corporation of Dublin for payment of so much of it as was properly raisable in the city,

M. R. 1917.

ATTORNEY-GENERAL *v.* CORPORATION OF DUBLIN.

and to the county council for so much as was properly raisable in the county. This in itself would not have required any apportionment to be made by the Commissioner of Police as between the city and county portions of the police district. If the Corporation and county councils had merely become the collectors of the police rate from the ratepayers within their respective jurisdictions they had merely to transmit to the Commissioner the amounts they had respectively recovered. But it will be found, on reference to the sections with which I shall specially deal later on, that the effect of the Local Government Act was to transfer the direct liability for the police rate from the individual ratepayers to the local authorities. The latter became the debtors, and, as between them (i.e. the Corporation) and the county council, it became necessary to apportion liability according to rateable value.

Prima facie this change does not appear to throw any greater burden upon any individual, but the Legislature recognized that it in fact did. The transfer of liability from the ratepayers to the local authority as the unit for taxation had the effect of making each individual ratepayer indirectly liable for a rate of more than eightpence in the pound. A levy on the district at this rate would, no doubt, discharge the liability of the local authority if every ratepayer paid the amount assessed upon him; but there are always defaulters, there are always some rates which are irrecoverable, and the deficiency should be made up. The solvent ratepayers would thus be called on to pay more than eightpence in the pound, and as this limit was prescribed by statute it was thought right to give compensation to the ratepayer if he was to be prejudiced by its removal. This compensation takes the form of a discount allowed to each local authority on making the payment—the measure of the discount being the probable loss on the collection and the cost of collection.

I now refer to the 66th section of the Local Government Act, which affects the changes I have mentioned. [His Lordship read sub-s. 2.]

Here is to be found the first change. Under the old system the Commissioner of Police transmitted to the Collector-General the total amount of his estimate for the maintenance of the police for the year, and the Collector-General levied such a rate

as was necessary to meet it, but not exceeding eightpence in the pound. Under the new system the Commissioner is obliged to deduct from his estimate so much thereof as would require a rate exceeding eightpence. In result, so far, there is no difference.

Sub-s. 3 provides for a similar estimate to be made by the Dublin Port and Docks Board, because that Board is entitled to annual payments for the maintenance of bridges, which were imposed on areas embracing the city and parts of the county of Dublin.

Sub-s. 4 provides for the apportionment of the estimated sums, and the payment of the apportioned parts. [His Lordship read the sub-section.]

This is absolutely clear. The apportionment is to be according to rateable value, and each council is made liable for the apportioned part. Here is to be found the transfer of liability from the individual ratepayers to their council, and the right of each council to deduct five per cent. from the amount claimed, to make up, inter alia, for irrecoverable rates so as in practice to keep the ultimate liability of the ratepayers within the limit of eightpence in the pound. We have, therefore, in sub-s. 2, a re-enactment of the limit placed upon the amount to be recovered by the Crown from the councils, and, in sub-s. 4, a compensatory allowance which was intended to obviate the possibility of any individual ratepayer being ultimately called upon to pay more than eightpence in the pound in consequence of the transfer of liability. It will thus be seen that it was the policy of the Local Government Act not to impose in substance any greater liability on any ratepayer than he was already subject to, the purpose of the Act being, as has been more than once judicially noticed, to improve the machinery of local government, but not to affect rights. So far, I think, the Local Government Act, which is a monument to the skill of the draftsman, presents no difficulty.

If we had only to deal with sect. 66, there would be no doubt as to the valuation which should be the basis for making the estimate for police purposes, and for apportioning it between the city and the county. It would be the valuation for the time being. This is not disputed. But we are confronted with sect. 65, around which the controversy in the present action arises; and as almost

M. R. 1917.

ATTORNEY-GENERAL v. CORPORATION OF DUBLIN.

every line of this section has been scanned in the course of the argument, I may read it in extenso. [His Lordship read sect. 65 and proceeded:—]

Now, what is the purpose and meaning of this section? Its first purpose seems to me to be plainly revealed by sub-s. 1. It was to facilitate revaluation of county boroughs at the instance of their councils, and to have lands within the boroughs rated on their actual value as ascertained by reference to the rents derivable thereout, instead of the prices of agricultural produce, which afford no real guide to the value of lands within a city boundary. This revaluation was most desirable for an equal distribution of liability among the ratepayers; but there was the danger of the right conferred upon the councils of county boroughs not being exercised from an obvious reason. Revaluation was expected to result in an increase which would have the effect of increasing the burden of the boroughs on an apportionment of liability for rates leviable upon a district comprising both the boroughs and parts of the adjoining counties. The most onerous of these rates was that leviable for union charges out of the poor law unions, which embrace portions of the boroughs and portions of the counties; and such a rate leviable on the unions would fall most heavily on that part which was the most highly valued. It was feared that this would be a deterrent from the exercise of the right to have a revaluation, and hence it was necessary to hold out an inducement to the boroughs, and this inducement is to be found in the first part of sub-s. 2, which in effect provides that, notwithstanding a revaluation, the apportionment between city and county shall be made on the previous valuation. Such is the construction placed on this sub-section by the King's Bench Division and the Court of Appeal (1), a construction in which I respectfully concur, and by which I am absolutely bound (1).

I may pass over the proviso in the middle of sub-s. 2, and go on to the concluding sentence, which is the crucial one. I must read it again: "This enactment shall apply to the police district of Dublin metropolis and to the Dublin bridge area within the meaning of the Dublin Port and Docks Board and Bridge Acts, 1876, as if it were a union, but with the substitution of the county

(1) *Belfast Guardians* v. *Belfast Corporation*, [1910] 2 I. R. 534.

council of the county of Dublin, with respect to the revision of the apportionment, for the said guardians." It was argued by counsel for the county council that this final sentence does not touch the police tax at all, and that the police district referred to is the district subject to the bridge tax, which is identical with the district subject to the police tax. It was said that the whole meaning was controlled by the reference to the Dublin Port and Docks Board Act, 1876. This is certainly a very great straining of language. It would be difficult to show that a district described as a police district was not so mentioned with reference to the police who had charge of it. To my mind this question is absolutely set at rest by sect. 66, sub-s. 4, where the very same description, "police district of Dublin metropolis," is made use of in the sense of a district controlled by police. No doubt the circumstance that the police district is subject to the bridge tax gives a double meaning to police district—that is, the district which is subject to the bridge tax and the district subject to the police tax, but that is very far from depriving it of the primary meaning of police district. I must therefore hold that police tax, just as union charges, comes within the scope of sect. 65.

The result of this is that in apportioning his estimate between the city and county districts the Commissioner of Police must work on the old valuation of the city. This is closed by the *Belfast Case* (1) to which I have referred. But it is said that sect. 65 deals only with apportionment, and that when the original total estimate is being made the Commissioner must act under sect. 66, and without regard to sect. 65, which deals with a distinct operation.

Here appears to me to lie the real difficulty of the case. The estimate is to be made under sect. 66, and there is nothing in that section which suggests that it should be made on any but the valuation for the time being, which is the general basis of applotting taxation under the Local Government Act. If, however, sect. 66 is to be read absolutely apart from sect. 65, and the latter is to be read as applying to apportionment only, we have this extraordinary result—the estimate of the full claim based on one valuation and the estimate of one of its parts based

(1) [1910] 2 I. R. 534.

M. R. 1917.

ATTORNEY-GENERAL *v.* CORPORATION OF DUBLIN.

on another. I find it hard to admit that two calculations so closely associated as the estimates of the whole and the division into component parts are only to be worked out on different principles so as to make one calculation irreconcilable with the other. But this is not the only curious result which would follow from holding that sect. 65 has no effect on the total estimate to be made under sect. 66. If the demand of the Commissioner is based on the new valuation of Dublin under sect. 66, and if it is apportioned on the old valuation in accordance with sect. 65, the county Dublin part of the police district would be burdened with a tax of more than eightpence in the pound on the entire valuation. Before I could sanction any such result I should find some clear enactment removing the limit of taxation prescribed, and re-affirmed by legislation in favour of the tax-payer. So far from there being any such enactment, I find, as I have pointed out, that when there was indirectly a danger of transgressing the limit by transferring liability to the local authority, a compensating provision was made in order to guard against an actual increase in taxation. I must, therefore, decide that both the estimate of the demand and its apportionment must proceed on the valuation of the city of Dublin before the revaluation under the Local Government Act came into force. The judgment will contain a declaration to the following effect:—That the Commissioner of Police of Dublin metropolis, in estimating and apportioning the amount which he finds necessary for the maintenance of the police force, and for the several purposes of the Dublin Metropolis Police Acts, under sects. 65 and 66, sub-s. 2, of the Local Government (Ireland) Act, 1898, was and is bound to have regard to the valuation of the city of Dublin as it existed immediately prior to the date when the last previous revaluation of the city under sect. 65 of the said Act came into force, and is not entitled to have regard to the last previous revaluation.

W. L.

The plaintiff appealed (1).

Appeal. 1917.

ATTORNEY-GENERAL *v.* CORPORATION OF DUBLIN.

May 7, 8. June 5.

Serjeant Sullivan K.C., Pigot K.C. (with them *Devitt*), for the appellant.

Clancy K.C., Carrigan K.C. (with them *P. O'C. White*), for the defendants, the Corporation of Dublin.

S. L. Brown K.C. (with him *T. Sullivan*), for the respondents, the Dublin County Council.

The arguments were similar to those in the Court below.

June 5.

SIR IGNATIUS J. O'BRIEN C.:—

Prior to the Local Government (Ireland) Act, 1898, there existed in connexion with the city of Dublin three rates which, as far as I know, had not their counterpart in any other part of Ireland. The first of these was a rate for the maintenance of the Dublin metropolitan police. This force is employed in an area which embraced part of the county in addition to the whole of the old city of Dublin, and at the present time includes the county borough, portion of the administrative area of the county outside urban districts, and some urban districts situate in the county. The original area has been altered by statutes which extended the boundaries of the city, and brought within its ambit portions of the county and some of the adjoining townships; but this does not affect the question which we have to consider.

In order to defray the costs of the police establishment, provision was made originally by 6 & 7 Wm. 4, c. 29, for raising money by means of a rate within the area to be served by the Dublin metropolitan police. For this purpose a police district was created, and by sect. 4 of 1 Vict. c. 25, an Act to make more effectual provision relating to the police in the district of Dublin metropolis, the Justices of Police, appointed under the Act of the preceding year, were authorized "to raise and levy from time to time on all houses, lands, and tenements situate and being within the said district such rates or taxes as they shall from time to time find necessary for the maintenance of the said police" and certain

(1) In the Court of Appeal, before SIR IGNATIUS J. O'BRIEN C., and RONAN and MOLONY L.JJ.

Appeal. 1917.

ATTORNEY-GENERAL *v.* CORPORATION OF DUBLIN.

Sir Ignatius J. O'Brien C.

other purposes, subject to the important proviso "that the sum or sums to be so raised and levied shall not exceed in the whole in any one year eightpence in the pound on the annual value of such houses, lands, and tenements."

The second tax peculiar to Dublin is a tax called "the bridge tax." This tax is imposed for the upkeep of the quay walls adjoining the River Liffey, and it is leviable on the same district within which the police tax is raised. It does not appear that it amounts annually to a large sum, but it is not, as is the police tax, limited to any rate. The third exceptional rate is a rate called "the bridge rate." It is a rate which was created by the Dublin Port and Docks Board (Bridges) Act, 1876 (39 & 40 Vict. c. lxxxv); and it was required to discharge the expenses which had to be incurred in connexion with the rebuilding of Carlisle (now O'Connell) Bridge, and the erection of a new structure known as Butt Bridge. Out of the rates to be levied, an annual charge on foot of interest and sinking fund had to be defrayed. It was by its nature a terminable rate; the area in respect of which this tax was leviable did not correspond with the police district, but it included that district. By sect. 31 of the statute just mentioned, the amount required to be raised by means of the bridge rate was to be applotted, as to a proportionate part, on the police district, and to be collected from the same persons who were liable for payment of the police rate within the district. Proportionate amounts affecting so much of the Kilmainham township as was not at that time comprised in the police district and affecting Clontarf township, also outside the police district in 1876, were to be raised and levied off those townships respectively; and the authority to determine the proportionate amount in each case was the Finance Committee of the Port and Docks Board. The bridge rate was in practical existence as a tax at the date of the passing of the Local Government Act of 1898; but by effluxion of time the debt incurred under the statute of 1876 has been paid off, if not in whole, at any rate to such an extent that only a very small portion remains outstanding.

By sect. 30 of the Collection of Rates (Dublin) Act, 1849 (12 & 13 Vict. c. 91), the applotment, assessment, and collection within the police district of the rate for the maintenance of the

police under 6 & 7 Wm. 4, c. 29, were transferred from the Police Justices to the Collector-General, an officer brought into existence by the Collection of Rates Act, to whom was entrusted the collection not only of the police rate but of poor rate, certain rates peculiar to the city of Dublin, and grand jury cess within the area specified in the statute. The procedure introduced by sect. 30 provided that the justices of the peace for the district of Dublin metropolis, appointed under 6 & 7 Wm. 4 c. 29, and who under a later statute were replaced by the Chief Commissioner of Police, should before the 10th December in every year estimate and ascertain, as nearly as may be, the amount of the sums of money which they should find necessary for the maintenance of the police force and other purposes of the Act of 1836. They were next bound to sign and certify the estimate, and on or before the 10th December to transmit the same to the Collector-General, who was thereby authorized and required to applot, levy, and collect the money mentioned in the manner provided by the Act, with, however, a proviso "that the amount of such portion of estimate as is empowered or required to be raised and levied by any rate under the said Acts and this Act, or any of them, shall not exceed the amount or sum which the said justices under the said Acts, or any of them, would have been entitled to raise and levy by any rate or assessment under the said Acts, or any of them, if this Act had not been passed."

No matter by what authority these rates or any of them were raised the position in practice was that if valuations within the district or area were increased or lowered no greater proportionate liability was inflicted on any person in one area than could be imposed on a person having rateable property in another. This is obviously so in regard to the rates which were not limited in amount, and also in regard to police rate within its own limits, as it was necessary to make an estimate first of the gross sum that was required, and, secondly, to ascertain how much an 8*d.* rate would produce. If the rates rose in the municipal area, the ratepayers in the extra-municipal area did not pay more than eightpence in the pound on the valuations under the statutes; nor would the balance be disturbed by reason of any general revaluation of a county that might be made under sect. 34 of the Valuation

Appeal. 1917.

ATTORNEY-GENERAL v. CORPORATION OF DUBLIN.

Sir Ignatius J. O'Brien C.

(Ireland) Act, 1852 (15 & 16 Vict. c. 63), but of course the increased valuation would produce a larger sum of money available for upkeep of police.

The office of Collector-General of Rates under the Dublin Collection of Rates Act, 1849, was abolished by sect. 66, sub-s. 10, of the Local Government (Ireland) Act, 1898, and a new scheme of collection had to be provided. This scheme, apart from the question which has been raised in the present appeal, is to be found in sect. 66, sub-ss. 2, 3, and 4 of which deal by name with the three special taxes which I have mentioned. With regard to the police rate, the Commissioner of Police is to estimate the amount of money which he finds necessary for the maintenance of the police force during the year "not exceeding the amount which he is entitled under the Dublin Metropolis Police Acts to raise by a rate thereunder," that is to say, the limitation to eightpence in the pound is preserved and has to be borne in mind by him when making his estimate. With regard to the other two rates, the Port and Docks Board are to make an estimate of the amount required to be raised for the purpose of bridge tax (if any) and bridge rate respectively. The next step is that prescribed by sub-s. 4. It imposes on the Commissioner and the Board respectively the duty of apportioning each amount so estimated between the city of Dublin and the rest of the police district of Dublin metropolis, or of the bridge area, as the case may be, which is outside the city of Dublin; and they shall so apportion according to rateable value. Both the Commissioner and the Board must send to the council for the city of Dublin a demand for the amount apportioned to that city, and to the council of the county of Dublin a demand for the amount apportioned to the rest of the police district or bridge area; and each body is then to raise the amount specified in the demand. There is, however, a discount of 5 per cent. which is to be deducted for the cost of collection and irrecoverable rates.

If sect. 66 stood alone, the position of affairs in the event of an alteration in the value of rateable property in the city or in the county would have been as I have indicated. An increase in the valuations of the city and county would result in a larger yield from the 8*d.* rate for the Commissioner of Police, and a decrease in

the valuations would mean that he would obtain less money, but as between the ratepayers in the two districts each ratepayer would only contribute at the rate of eightpence in the pound on his valuation to the total amount paid by the body; the sum mentioned in the demand note would never exceed eightpence in the pound; the proportion between the two bodies would always depend upon the actual condition of the valuation rolls at the date of the estimate.

It is now necessary to consider two other sections of the Local Government Act, namely sects. 43 and 65. The former has been the subject of judicial decision. Sect. 43 provides that: "All expenses of the guardians of a union shall be raised equally over the whole union, and shall be called union charges, and where a union is divided between more than one county the total amount to be raised over the union shall be apportioned between each divided part in proportion to rateable value, and the amount so apportioned to a divided part shall be raised equally over that part as if it were a separate union." By sect. 65, sub-s. 1, provision was made, at the request of a county borough council, for a general revaluation of the land in the borough in the manner directed by sect. 11 of the Valuation (Ireland) Act, 1852, with respect to houses and buildings. It then became necessary, where part of a union was within and part without any county borough, to make provision which would prevent a revaluation by the county borough from operating in any way unjustly to the ratepayers in the county; and, accordingly, sub-s. 2 of sect. 65 enacted in words which, legislating for such a case, were fairly clear, that the total amount to be raised for union charges in that event should be apportioned between each such part of the union in proportion to the rateable value of each part "at the date" when the revaluation came into force. It was decided by this Court in *Belfast Guardians* v. *Belfast Corporation* (1) that the apportionment of poor rate under sub-s. 2, in the case of a union, part of which was within and part without a county borough, was to be made in proportion to the rateable value of each part on the valuation of the county borough in force immediately before the revaluation and not on the valuation as ascertained by the general revision. That decision

(1) [1910] 2 I. R. 534.

Appeal. 1917.

ATTORNEY-GENERAL v. CORPORATION OF DUBLIN.

Sir Ignatius J. O'Brien C.

which binds us produces the result, that for the purpose of calculating the amount which should be apportioned as between the county and the city, the respective valuations were not to be taken as of the year in which the proportion was to be ascertained, but as of a date artificially fixed, namely the period immediately preceding the coming into operation of the revaluation. This decision prevented what otherwise would have been a most unjust condition of affairs.

We now come to the question which arises for our decision. The more one considers it, the narrower it becomes; although the result to the Corporation will be very material. I think one may assume that the last clause in sub-s. 2 of sect. 65 was somewhat hastily inserted; but there can, I think, be no doubt that the draftsman intended in some way or other to apply to the police rate and the rate struck in respect of the Dublin bridge area the method of apportionment which had been enacted with regard to parts of a union. Two arguments were presented to us, one for and the other against the application of sub-s. 2 to the police rate [and the bridge rate]. On behalf of the Crown it was contended that the word "it" in the clause "as if it were a union" was grammatically referrable to the expression "the Dublin bridge area" which immediately preceded, and was not applicable to the expression "police district of Dublin metropolis" in the earlier part of the sentence. It was argued, as I understand, that a reason for this construction was supplied by sect. 31 of the Dublin Port and Docks Board (Bridges) Act, 1876 (39 & 40 Vict. c. lxxxv), inasmuch as that section dealt with four distinct areas, and that as a proportionate amount had to be levied within each it was considered necessary to utilize the provisions of sub-s. 2 for the purpose of estimating the proportions as between these different areas. In passing I would say that there could have been no object in directing that this enactment should apply to the police district of the Dublin metropolis if it was not intended to apply it to that district. The words are there, and I am not at liberty to strike them out of the statute.

Taking the argument that the police district of Dublin metropolis was only mentioned because it was one of the four parts of the taxable area dealt with in sect. 31 of the Port and

Docks Board Act, 1876, I ask if the object was merely to deal with the bridge area, and in some way to bring in these four different areas for the purpose of striking a proportion, why were not Kilmainham and Clontarf named as well as the police district of Dublin metropolis? "Police district of Dublin metropolis," for the purpose of taxation for the maintenance of the force and incidentally for the purpose of the bridge tax, was a perfectly well-defined area to which special provisions applied; so also was the "bridge area," and I cannot conceive that the intention of the Legislature, when mentioning each area, was to legislate only for one, and that in respect of a rate which, even at that date, was a disappearing one. Counsel for the Crown rely on that as a reason in support of their argument. I do not agree that, if the object was only to deal with the bridge rate, the natural thing was to leave out all reference to the police district, which was not the same taxable area as the bridge area. It must have been introduced for some object, and the natural interpretation seems to me to be that it deals with it as regards this matter on the same footing as the unions. If this be the true meaning of the section, it follows, as the Master of the Rolls has said, that the decision of this Court in the *Belfast Case* (1) is a clear authority against the argument put forward on behalf of the Commissioner of Police. The practical result is, of course, obvious; an artificial and non-existing valuation is stereotyped, and consequently what really represents a rate less than an eightpenny rate on the actual existing valuation of the city will be struck; but, speaking for myself, I cannot adopt the argument which was put forward that no such result could have been intended. It must have been manifest when sect. 65, sub-s. 1, was being considered that if the sub-section stood alone, the contribution of the city of Dublin towards the cost of the metropolitan police would be materially affected by a revaluation; and it is not improbable that Parliament intended the result which must follow from our decision. I cannot strike out the words in sub-s. 2 merely because the Treasury does not get the benefit of the increase in the valuation which, in the absence of the provision, it would undoubtedly get; although a construction which left sect. 65 entirely out of consideration would work no hardship to the

(1) [1910] 2 I. R. 534.

Appeal. 1917.

ATTORNEY-GENERAL v. CORPORATION OF DUBLIN.

Sir Ignatius J. O'Brien C.

portion of the county of Dublin which is liable to contribute towards this tax.

Counsel for the appellants put forward another view of the section which in substance amounts to this: even assuming that sect. 65 is capable of the construction which, I think, it bears, still, so far as the Commissioner of Police is concerned, he remains unaffected; that he may base his demand on an eightpenny rate struck in respect of the existing valuation, leaving the two taxable areas to adjust their differences as best they can. It is admitted that this construction would have the curious result that one of the contributing areas would have to pay a rate of more than eightpence in the pound. That is undoubtedly so, because it follows that if the Commissioner of Police was to be at liberty to calculate the amount of his demand on the existing valuation while the apportionment was to take place on the proportion of valuation as it existed prior to the revaluation, one of the areas would have to pay a sum of money, to provide which a rate of more than eightpence in the pound should be struck. Whatever may have been the intention, it is not to my mind conceivable that it was ever intended that there should be a liability on any ratepayer, either directly or indirectly, of more than eightpence in the pound. The partial repeal of the express provisions with regard to the limitation of eightpence in the pound would be prima facie wrong; and, indeed, it appears to me that sub-s. 2 of sect. 65 itself preserves the limitation contained in the earlier Acts, and of necessity prevents such a construction.

I am accordingly of opinion that the judgment of the Master of the Rolls is right, and that it should be affirmed.

RONAN L.J.:—

This is a curious case. A statute says that if the expense of the police in the police district exceeds eightpence in the pound of the valuation of the district, the Crown shall be entitled to a sum equal to eightpence in the pound on the valuation of the district, to be raised by a rate. (I omit the deduction of five per cent.) A simple illustration, with convenient figures, will best explain the question in the case.

The district consists of two parts: one in the county, the

other in the city. The existing valuations are, say, county portion, £30,000; city portion, £60,000: total, £90,000. Eightpence on the former would be £1000; on the latter, £2000: total, £3000. There is a statutory provision that neither portion shall be liable for more than eightpence in the pound on its valuation; that is, county, £1000; city, £2000. The Crown claim the £3000—£1000 from the county; £2000 from the city. The county raise no objection.

The city objects to pay more than £1000. Its case is this:—There was a former superseded valuation of the city portion of the district at £30,000. Sect. 65 of the Local Government Act provides that the entire claim of the Crown must be apportioned between the county and the city in proportion to the valuations when this superseded valuation was in force. That would be equal division. This as to the £3000 would be £1500 each. But not more than £1000 can be put on the county. Therefore not more than £1000 can be put on the city; therefore the claim of the Crown must be cut down to £2000, to be equally divided between the county and the city.

Subject to this matter of apportionment it is clear, prima facie, 1, That the Crown is entitled to eightpence in the pound on the existing valuation; 2, That the only limitation of the liability of each portion of the district is eightpence in the pound on the valuation of the portion; 3, That neither portion is asked to pay more than eightpence in the pound on its valuation.

The Master of the Rolls held that the provision for apportionment in sect. 65 controlled and prevailed over all these matters, and that the contention of the city must be upheld. My colleagues have taken the same view.

I have arrived at the conclusion that, on the true construction of sect. 65, it has not this extraordinary effect, that the city is liable to the extent of eightpence in the pound on the existing valuation of its portion of the district, and that the Crown is entitled to the declaration claimed in paragraphs 1 and 2 of the prayer of the statement of claim.

As to the claim of the Crown, sect. 27 of the Valuation Act of 1852 makes the valuation under that Act the valuation for

Appeal. 1917.

ATTORNEY-GENERAL v. CORPORATION OF DUBLIN.

Ronan L.J.

rating purposes. Sect. 34 provides for a general revision of the valuation of counties, and enacts that "the new valuation when completed shall have the same effect and operation to all intents and purposes as the former general valuation or general revision of valuation, and shall supersede the same." Sect. 65, sub-s. 3, of the Local Government Act provides that "general revaluation" means "a general revision under sect. 34 of the Valuation (Ireland) Act, 1852." It is therefore clear that the "valuation of the police district" at the period we are dealing with was made up of (*a*) the old valuation of the county portion, and (*b*) the general revaluation of the city portion. Indeed this was not disputed. The only statutory limit to the claim of the Crown is eightpence in the pound on this entire valuation. The right of the Crown to this is clear and free from doubt on the face of the statutes. It is recognized by the express provision of sect. 65, sub-s. 3, that the revised general revaluation is to supersede the old valuation; and the decision of the Court below, and of this Court, refuses to give effect to the plain and unequivocal right of the Crown to eightpence in the pound on this new valuation.

On the other hand, it is plain that if two individuals, or two districts, are liable to contribute a paramount charge in certain proportions, it is almost impossible to hold that the Legislature intended to place it in the power of one of them, without the consent of the other, to increase the burden thrown on the other, either (*a*) by altering the proportion in which they are to contribute, or (*b*) by increasing the amount of the charge itself, and retaining the original proportion. The distinction between these two things, to my mind, lies at the root of the present case. The apportionment of a charge the amount of which is not affected by the valuation is one thing; the increase of the amount of the charge occasioned by an increase in the valuation is another. The two things are quite distinct in their character and incidents. I shall only say now that the present case is a case of the second class, not of the first.

I shall now deal with the first class of case. The valuation effected under the general revaluation is made on a principle different from that of the old valuation, and its effect is, as a general

(1) [1910] 2 I. R. 534.

rule, to increase substantially the nominal or statutory valuation of the premises in the district, although their real value as measured by rent or prices remains unchanged.

To explain my meaning, I shall take an extreme case with the simplest figures. I shall assume that the old valuation of the police district was £60,000; that of this £30,000 was on the county, and £30,000 on the city, and I shall assume that there was a fixed police charge of £1000 per annum. The county would then pay £500 and the city £500; half each. I next assume that the general revaluation of the city takes place, and that the valuation of the city is doubled under the new system. The valuations will then be—county, £30,000; city, £60,000. If the apportionment is according to existing valuation (the £1000 remaining unchanged), the county will only have to pay one-third, and the city will have to pay two-thirds, viz.: £333 and £666 respectively. This was really the position in the *Belfast Case* (1) in reference to union charges. In that case, the city had brought about the revaluation; but counsel for the corporation argued that the same principle must apply if the revaluation had diminished, instead of increasing the city valuation. The Court took this view, and held that the revaluation of one of the contributory districts should neither increase nor diminish the actual burden on the other contributing district. This was, in the words of the Lord Chief Baron, "the reason for" the 65th section. The 43rd section of the Local Government Act, 1898, provided that union charges, when the union is divided between more than one county, should be apportioned in proportion to rateable value. The 65th section was passed to prevent this applying in the case of general revaluation so as to affect the liability of the district not comprised in the revaluation. The Court accordingly held that the effect of the 65th section was, that union charges should be apportioned according to the valuations in force immediately prior to the revaluation.

This alteration in the proportions of contributions to fixed charges is one of the effects of a general revaluation of portion of a taxed area. I must define more particularly what I mean by

(1) [1910] 2 I. R. 534.

Appeal. 1917. ATTORNEY-GENERAL *v.* CORPORATION OF DUBLIN. Ronan L.J.

"fixed charges," because the term does not accurately express my meaning. I divide charges into two classes:—(A) Charges which do not depend on the amount of the valuation, but are independent of it. These I shall call fixed charges. (B) Charges, the amount of which depends on the valuation, and which are in fact a defined fraction of the valuation and vary directly with it, e.g., income tax on lands. Union charges are entirely of class (A), and the only effect of revaluation on these is the alteration of the proportion of contribution. It does not affect the amount of the charges. As to class (B), however, revaluation has an entirely distinct and separate effect. It alters the total amount of the paramount charge.

In the case I have taken, let me assume that the police charge, instead of being a fixed sum of £1000 per annum, is a sum equal to eightpence in the pound of the valuation of the police district. Previous to revaluation, the valuation of the entire police district was £60,000—£30,000 city, £30,000 county; eightpence in the £ on this is £2000. Of this the county paid £1000 and the city £1000. The revaluation raises the city to £60,000. This raises the total to £60,000 + £30,000 = £90,000. But this raises the charge from £2000 to £3000. This is an entirely new element, entirely absent in the case of union charges and other cases of class (A). How is it to be dealt with? Apart from sect. 65, it should be apportioned according to existing valuation. In such case, the county would pay one-third = £1000; the city, two-thirds = £2000. That is to say, the liability of the county would remain unaffected by the revaluation of the city. If the Commissioner of Police made his demand apportioned according to sect. 66, sub-s. 4, this would be the result. What would be the result of applying sect. 65? That each should pay £1500, that is, that an increased burden of £500 should be thrown on the county by reason of the revaluation brought about by the city. In other words, the effect of applying sect. 65 would be directly to defeat the very object and reason of the section.

In truth this is not a case of apportionment of an existing paramount claim: it is a case of a new paramount claim of £1000 created entirely by the revaluation. A section dealing with the apportionment of union charges only can really have no application to a question of the incidence of a new charge created by the

revaluation. There is no analogy between such a charge and union charges. The city obtains the revaluation for its own objects. It increases borrowing powers, and has other beneficial effects. On the other hand, it increases the burden on the city for all external claims calculated on the valuation, e.g. income tax. The city has to take the burden with the benefit. I can see no reason why the city should not bear the burden of the increase in the police tax, solely caused by its own revaluation, in the same way as any other external charge increased in the same way.

The substantive portion of sect. 65 deals only with the apportionment of "the total amount to be raised for union charges." This comes within class (A). In such cases sect. 65 preserves the existing liability of the district not subject to the revaluation. In such cases the revaluation does not create any new paramount charge, or increase any existing charge. If the sum to be apportioned, instead of being "the total amount of union charges," a sum within class (A), had been a sum within class (B), which was a definite fraction of the total valuation, and therefore varying in the same proportion, sect. 65 would not only have been unnecessary, but would have directly defeated the object for which it was passed. The vital point, however, is that the substantive portion of the section only deals with union charges, *i.e.* class (A). In my opinion the section can have no application to the wholly different question of the incidence of an additional charge created by the revaluation. Such a matter is entirely outside the scope and intention of the section, and it would be repugnant to the whole object of the section to apply it to such a matter, having regard to the result as shown above. It is this section which is sought to be applied in the present case. What is the operative clause? "This enactment shall apply to the police district of Dublin metropolis and to the Dublin bridge area . . . as if it were a union." This is what is now commonly called "a deeming clause." As FitzGibbon L.J. said in *In re Thomson's Estate* (1), p. 314, "This case affords one more instance of the difficulty of working out an enactment that a thing shall be deemed to be what it is not." That case depended on how far effect should be given to the words "shall be

(1) [1907] 1 I. R. 311.

Appeal. 1917.

ATTORNEY-GENERAL v. CORPORATION OF DUBLIN.

Ronan L.J.

entitled," "in like manner as if he had purchased the same." Walker C. said: "This is a very plain section, which can, in my opinion, only bear one interpretation." Holmes L.J. said: "I do not trouble with the reasons why the legislation was passed;... the section is to my mind as clear as it can be." And the Court gives full effect to the literal meaning of the words. The case went to the House of Lords, and the authorities applicable to the construction of "deeming" clauses were cited (they were not referred to in the Court of Appeal). They are—1, *Gover's Case* (1), where James L.J. said: "Where the Legislature provides that something is to be deemed other than it is, we must be careful to see within what bounds and for what purpose it is to be so deemed." 2, *Ex parte Walton* (2), where the same Judge said: "The Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to." 3, In *Hill* v. *East and West India Dock Co.* (3) this passage from *Ex parte Walton* (2) was quoted and adopted by Lord Cairns at pp. 455-6, and by Lord Blackburn at p. 458. In that case the words were, the lease "shall be deemed to have been surrendered." Lord Cairns, having considered the literal construction, says, at p. 455: "But, on the other hand, is that the only interpretation? For that purpose your Lordships, I think, must consider what the object of this provision is. Why is it that there is this statutory fiction introduced?... I say that we must look to what the purpose is." Having stated the purpose and objects of the Act in question, he proceeds: "If, therefore, the statute can admit of any construction limited to these particular objects, we must consider whether that is not a construction preferable to the first to which I have referred. The first construction requires us, if this section is taken literally, to do that for which there is no motive, and as to which there can be no explanation given, that is to say, to destroy the rights and property of third persons without accomplishing any beneficial object." He then cites with approval the passage from James L.J.'s judgment in *Ex parte Walton* (2), to which I have already referred, and continues: "It appears to me that both of those constructions to which I have referred—the construction

(1) 1 Ch. D., at p. 188. (2) 17 Ch. D. 746, at p. 756. (3) 9 A. C. 448.

contended for by the appellant and the construction placed upon the section by James L.J.—are possible constructions; and where there are two constructions the one of which will do, as it seems to me, great and unnecessary injustice, and the other of which will avoid that injustice, and will keep exactly within the purpose for which the statute was passed, it is the bounden duty of the Court to adopt the second and not to adopt the first of those constructions." Lord Blackburn said the question was one of very considerable difficulty, but he felt he had been relieved from that difficulty because Lord Justice James, in *Ex parte Walton* (1), had expressed exactly what he conceived to be the ratio decidendi. Lord Watson adopted the judgments of Lords Cairns and Blackburn.

In *Re Thomson's Estate* is reported in [1908] A.C. 298 under the name of *De Vesci* v. *O'Connell* (2). Lord Ashbourne gave the leading judgment, based on these authorities, and regretted that they had not been referred to in the Court of Appeal. Lord Atkinson, at p. 314, gave judgment applying the principle of these cases. Lord Loreburn said: "I think the words in question are to be construed to effect the purposes of the Act, and not to affect parties whom it was not the purpose of the Act to touch." Lords James, Robertson, and Collins simply concurred. Lord MacNaghten thought there was no statutory fiction.

Applying these principles to the clause in question, what is the meaning of the expression "as if it were a union"? This is clearly only in reference to paramount charges; but further is it not, at all events, fairly open to the construction, that it only applies in reference to paramount charges of the same character as union charges and analogous to union charges in their incidence? The object of the section is to prevent the revaluation affecting the district not revalued. Surely it is plain that to apply it to a case within (B) is to defeat the whole purpose and object of the section.

But further between what persons is the statutory fiction to be applied? Surely only as between the parties liable to the paramount charge. Any construction which would apply so as to cut down the rights of the owner of the charge must be entirely outside the scope of the section.

(1) 17 Ch. D. 756.

(2) [1908] A. C. 298.

Appeal. 1917.

ATTORNEY-GENERAL *v.* CORPORATION OF DUBLIN.

Ronan L.J.

The construction adopted by the Master of the Rolls necessarily involves the refusal by the Court to give effect to a clear and unequivocal statutory right of the Crown. The effect of sub-sect. 4 of sect. 65, as I have already pointed out, is to make the revaluation supersede the former valuation. The Crown is entitled to eightpence in the pound on the existing valuation. The decision of the Court is that notwithstanding this the Crown shall only be entitled to eightpence on the superseded valuation. The case is, therefore, infinitely stronger than any of those I have cited; for it applies a statutory fiction so as to involve express refusal to give effect to a clear statutory right of a third party to whom the fiction was never intended to apply.

In the case I have put, the existing charge was £2000. Apportion that according to sect. 65, and each pays £1000. The new charge is £1000; that should fall on the party who created it, i.e. the city, not on the county who had nothing to say to its creation. This result is brought about by holding that the 65th section does not apply to an entire charge of this class (B), and that it should be apportioned according to the existing valuation. It is equally brought about by holding that there is to be no apportionment of the new charge, but that it must be borne by the body who brought it into existence. The result is the same in both cases, viz.:—The statutory claim of the Crown has its full effect. Neither body pays more than eightpence in the pound on its valuation. Each does pay eightpence in the pound on its valuation.

Sections 65 and 66 deal with the bridge tax, the bridge rate, and the police rate. There is no limit in the case of the two former. In the case of the police rate there is the limit of eightpence in the pound on the valuation of the district. There is no difficulty in applying sect. 65 to the bridge tax and bridge rate. They are plainly within Class (A). The revaluation in no way affects the amount of the claim or charge. They are of the same class as union charges. Section 65 when applied preserves unaffected the liability of the county portion of the areas.

In the case of the Police Rate it is different. So long as the estimate was under the old limit of eightpence in the pound on the old valuation it was a case within Class (A); the amount of the

claim was not affected by the valuation, which was of the same class as union charges. Section 65 when applied would properly preserve the liability of the county area from being affected by the revaluation. But once the limit was reached, the case passed into Class (B). It became a charge of eightpence in the pound on the valuation just as much as if it had been originally so created. The revaluation created a new charge so far as it increased the amount of the charge beyond the eightpence in the pound on the old valuation. Once the claim became a claim for eightpence in the pound on the valuation, the county area could only preserve its liability unaffected by having the charge apportioned according to the existing valuation, and to apply sect. 65 in such a case would only have the direct contrary effect.

The demand in respect of the police area is in substance a demand for eightpence in the pound on the valuation.

I am of opinion for the reasons I have given that such a case is not within the object and purpose of sect. 65; that the statutory fiction cannot be extended to such a case or applied so as to defeat the Crown demand. The construction I have adopted, confining the application of the fiction, 1, to claims of Class (A) analogous to union charges, and, 2, to the two areas and not extending its operation to the claimant, seems to me to come within the language of Lord Cairns which I have quoted, and in addition does not involve direct refusal to give effect to the clear and unambiguous right of the Crown under the statutes. This construction gives effect to every word in the last clause of sect. 65, sub-s. 2, as it makes the sub-section apply to the police area as "if it were a union" when the charge is analogous to a union charge. It also gives full effect to the clear statutory provisions as to the claim of the Crown. I am of opinion that the Crown are entitled to judgment; that sect. 65 does not apply; that the apportionment must be according to the existing valuation under sect. 66, sub-s. 4.

MOLONY L.J.:—

In this case the plaintiff claims a declaration that the Commissioner of Police in estimating the amount to be raised by the police rate is to have regard to the increased valuation of the

Appeal. 1917.

ATTORNEY-GENERAL *v.* CORPORATION OF DUBLIN.

Molony L.J.

police district caused by the revaluation of the city of Dublin, and that he is to apportion the amount between the city of Dublin and the portion of the police district outside the city, in proportion to the rateable valuation of each at the time immediately after the revaluation of the city of Dublin came into force.

The decision in this case depends upon the construction of Sects. 65 and 66 of the Local Government (Ireland) Act, 1898. It is unnecessary for me to refer to the earlier statutes, which have been already dealt with; but it may be shortly stated that before the passing of the Local Government Act of 1898 the Chief Commissioner of Police presented his estimate each year to the Collector-General, and the Collector-General thereupon proceeded to levy the rate upon the entire police district, and there was no necessity for any apportionment. When the Act of 1898 abolished the office of Collector-General of Rates, and made the police rate payable in part by the Corporation of Dublin and in part by the County Council of the county of Dublin, it became necessary to apportion the total amount to be raised between the two contributing parties, and accordingly the Commissioner of Police, under sect. 66, sub-s. 2, had to estimate the amount of money which was necessary for the maintenance of the police force, not exceeding the statutory limit; and then, under sub-s. 4, he had to apportion the amount between the city of Dublin and the rest of the police district of Dublin metropolis, and was bound to apportion it according to the rateable value. He calculated the amount at the rate of eightpence in the pound on the respective valuations, having allowed, however, in pursuance of the sub-section, five per cent. as and for the cost of collection and irrecoverable rates, and office expenses. Until there was a general valuation no difficulty whatever could arise, as the amount to be estimated and apportioned was calculated on the then existing valuation of the city and the portion of the county within the police district.

Provision was, however, made by sect. 65 for a general revaluation of rateable hereditaments being made in a county borough on the application of the council, and the council in that case was to pay half of the cost of the revaluation; and it

was specifically provided in the sub-section that upon any such general revaluation, the land in the borough should be valued in the manner directed by sect. 11 of the Valuation (Ireland) Act, 1852, with respect to houses and buildings. It was seen that if the sum was to be raised rateably off two districts an injustice would be worked if there was a difference in the basis of the valuation of the two districts; and, consequently, if the apportionment was to be continued on the basis provided by sect. 66 the borough would have to pay a larger amount in consequence of the increase in the rateable valuation, which would necessarily follow from the method of valuation to be adopted in the borough (i.e. valuing land in the same way as houses and buildings). Sect. 65, sub-s. 2, was intended to meet this difficulty, and the first part of the section is conversant with the case where part of a union is within and part without a county borough in respect of which a valuation was made under the section, and it provided that in such case "the total amount to be raised for union charges in that union shall be apportioned between each part of such union in proportion to the rateable value of each part at the date when the revaluation under the section came into force."

It has been held by this Court, affirming the King's Bench Division, in the case of the *Belfast Guardians* v. *The Belfast Corporation* (1), that an apportionment under this sub-section was to be made in proportion to the rateable value of each part of the union on the valuation of the county borough in force immediately before the revaluation, and on the valuation of the respective county portions in force at that date. The reason of this is well stated by Palles C.B. in his judgment in the King's Bench Division:—"My construction of this 65th section is that it was intended to preserve the proportional liability to the incidence of rates that existed at the time the valuation came into force, because up to that time everything was uniform, and you were able to contrast the valuation of one district with the other. But the moment the revaluation came into force everything was changed. You could not speak of one in terms of the other. You might as well contrast a distance in Irish miles with one in

(1) [1910] 2 I. R. 534.

Appeal. 1917.

ATTORNEY-GENERAL v. CORPORATION OF DUBLIN.

Molony L.J.

English miles without knowing the ratio of one Irish mile to one English mile; or, as Mr. Ronan put it, one currency with another. So I think this section was put in very much in aid of the contributory areas, and it would seem that that would be a fair basis for a section that gave a right to a particular person to do a thing if he wished, but did not bind him to do it" (1).

The sub-section was not, however, confined to union charges, because it provides in express terms that it shall "apply to the police district of Dubin metropolis and to the Dublin bridge area within the meaning of the Dublin Port and Docks Board and Bridges Act, 1876, as if it were a union." It is contended that these words have reference only to the Dublin bridge area, which, under the Dublin Port and Docks Board and Bridges Act, 1876, comprises the Dublin metropolitan police district and three other districts, and in support of this contention reliance is placed on the word "it." On the other hand, it seems to be clear that the police district of Dublin metropolis is referred to as a distinct entity. On the construction given to this provision by counsel for the Attorney-General there would have been no necessity for mentioning the Dublin metropolitan police district at all. It seems to me to be clear that the enactment was made to cover the bridge tax and the police tax, which are leviable out of the Dublin metropolitan police district, as well as the bridge rate, which is leviable out of the bridge area as defined by the Dublin Port and Docks Board and Bridges Act, 1876.

It was next contended on behalf of the Attorney-General that even if sect. 65 applied, it was confined to apportionment, and that the total amount to be raised was still to be estimated according to the provisions of sect. 66, that is to say, that the amount would be calculated at the rate of eightpence in the pound on the existing valuation, but that the apportionment between the city and the county was to be in the proportion of the old valuation for the city to the existing valuation for the county. The effect of this was admitted to be that the county, in order to meet the demand, would have to raise a rate exceeding eightpence in the pound. The limit of eightpence in the pound, is,

(1) Post, p. 445.

however, imposed in express terms in three statutes, namely, 1 & 2 Vict. c. 25, s. 4; 2 & 3 Vict. c. 78, s. 7; and 12 & 13 Vict. c. 91, s. 30; and it was never the intention of Parliament to repeal these sections by the Local Government Act, which dealt only with procedure.

I find myself unable to agree with Lord Justice Ronan in his construction of sect. 65, sub-s. 2, which gives it an in-and-out effect, which I cannot think was ever intended by the Legislature. He would make the sub-section applicable if the cost of the police amounted to $7\frac{3}{4}d.$, but inapplicable if it amounted to $8\frac{1}{4}d.$ in the pound on the new valuation. It seems to me, however, that the object of the sub-section was to prevent the burden on the city of a tax leviable on the Dublin metropolitan police district being increased by reason of the revaluation, and that there can be no real difference as regards the sub-section between the bridge tax and the police tax, both of which are leviable out of the Dublin metropolitan police district alone, and both equally, in my opinion, within the ambit of the sub-section. In considering the object of sub-s. 2, it must always be remembered that under sub-s. 1, upon the revaluation, land was valued in the manner directed by sect. 11 of the Valuation (Ireland) Act, 1852, with respect to houses and buildings; and it is this new method of valuation which has largely contributed to the increase, without in any way adding to the duties or responsibilities of the police force.

On consideration of the whole case, I fully agree with the judgment of the Lord Chancellor, and consequently think that the decision of the Master of the Rolls in this case was right and ought to be affirmed.

NOTE.

The question decided in *Belfast Guardians* v. *Belfast Corporation* (1) had been previously raised in the *King* (*Belfast Corporation*) v. *Belfast Poor Law Guardians* (2) upon the argument of motions to make absolute two conditional orders for certiorari, which had been obtained by the Corporation of Belfast to quash the apportionment and demand note. Two questions were then argued: (*a*) whether certiorari would lie; (*b*) whether the guardians' principle of appor-

(1) [1910] 2 I. R. 534.

(2) (Unreported.)

Appeal. 1917.

ATTORNEY-GENERAL v. CORPORATION OF DUBLIN.

tionment was right. The judgment of the Court was delivered by Palles C.B., on May 7th, 1909; and as it was the authority most strongly relied upon by counsel for the Corporation of Dublin in the foregoing case, it is deemed advisable to give by way of appendix a full report of it. The judgment of Palles C.B. was as follows :—

PALLES, C.B. :—

My opinion is that this Court was wrong in issuing these two writs of certiorari. When we got a case that we knew would go to the Court of Appeal, like *M'Cusker* v. *Commissioner of Valuation* (1), I called the attention of the Court of Appeal to the matter, with a view to having their deliberate opinion upon it. They affirmed our decision.

Our decision was that a writ of certiorari should issue. That involved that certiorari would lie to quash a rate, and that a rate was within the definition of a "judicial act" given by May C.J., in the *Queen* v. *Corporation of Dublin* (2), which, I think, is a right definition. They affirmed that certiorari will lie for a rate, and that therefore the making of a rate was a judicial decision. As to making that the basis of argument to apply it to this particular new matter, I draw the line, and I do not think I am bound by any decision either of the King's Bench Division or of the Court of Appeal. I have long ago stated my view as to what is a judicial act for which certiorari will lie. I stated it deliberately in the *Queen* (*Wexford County Council*) v. *the Local Government Board* (3). "I have always thought that to erect a tribunal into a 'Court' or 'jurisdiction' so as to make its determinations judicial, the essential element is that it should have power, by its determination within jurisdiction, to impose liability or affect rights. By this I mean that the liability is imposed or the right affected by the determination only, and not by the fact determined, and so that the liability will exist, or the right will be affected, although the determination be wrong in law or in fact. It is otherwise of a ministerial power. If the existence of such a power depend upon a contingency, although it may be necessary for the officer to determine whether the contingency has happened, in order to know whether he will exercise the power, his determination does not bind. The happening of the contingency may be questioned in an action brought to try the legality of the act done under the alleged exercise of the power. But where the determination binds, although it is based on an erroneous view of facts or law, then the power authorizing it is judicial."

In this particular case it appears to me that the guardians in apportioning between each part of the union the portions which should be borne by those three different districts were doing a purely ministerial act. I think it was not to determine what the law was and by their determination to bind others, but it was applying a fixed principle of law, which it is imputed to them they knew, to certain figures appearing in the rate-book, and that was no more

(1) 36 I. L. T. R. 176, 180. (2) 2 L. R. Ir., at pp. 376, 377.
(3) [1902] 2 I. R. 349, at p. 373.

than two or three sums in the rule of three. Therefore, I think, there is no doubt that it does not lie in this case; and if it is to be held that it does lie, that must be determined elsewhere.

But now I come to the point to be decided, and a very nice point it is. We have received great assistance from the argument; but for myself, from the time it was opened, I never had any doubt on the subject at all. The main strength of Mr. Brown's argument is the 43rd section, and but for the 43rd section he would have no locus standi at all. The 43rd section, as I understand it, established a great principle in reference to which for a long time there was great agitation in Ireland. It established union rating, and that rating was to be according to the rateable value.

Sect. 65 determines what is the rateable value; and to argue that there is any inconsistency between sect. 43 and sect. 65, seems to me not only illogical but impossible, because sect. 65 supplies that without which sect. 43 could have no operation, and that is, it deals with what is the rateable value mentioned in sect. 43. Mr. Ronan's argument is very conclusive; that is, supposing no change was to be made, supposing it was as Mr. Brown argues, sect. 43 might have been allowed to remain where it was, and that section, together with the operation of the Valuation Acts, would have worked out exactly what Mr. Brown wants, with the exception that there could be no annual revisions, and therefore we knew from the very existence of a section in relation to this special enactment that there is something peculiar to be done, and in considering it we must look for the reason of it.

This revaluation is to depend on the voluntary act of one party who had jurisdiction over one of the three divisions that are liable to this rate, that is upon the act of the corporation, as it seems to me that the Legislature, while it gave this right to the corporation, guarded as well as it could against the corporation being able to impose by its own act any liability upon the other contributory areas, which they would not otherwise be subject to, as a liability to a greater amount. Now, supposing that the section had not been passed, what would have been the proportional liability of the corporation and of the two other contributory areas? It would have been exactly in the proportion of the one valuation that existed based on the one common principle—the amount of that valuation in the respective areas at the date before this came into operation—because you have then the one common valuation made upon the same principle in force as to portion of the county of Down within the Belfast Union, in force as to part of the county of Antrim within that union, and in force within the county borough of Belfast.

Now my construction of this 65th section is that it was intended to preserve the proportional liability to the incidence of rates that existed at the time the valuation came into force, because up to that time everything was uniform, and you were able to contrast the valuation of one district with the other. But the moment the revaluation came into force, everything was changed. You could not speak of one in terms of the other. You might as well contrast

Appeal. 1917.

ATTORNEY-GENERAL v. CORPORATION OF DUBLIN.

a distance in Irish miles with one in English miles without knowing the ratio of one Irish mile to one English mile, or as Mr. Ronan put it, one currency with another. So I think this section was put in very much in aid of the contributory areas, and it would seem that that would be a fair basis for a section that gave a right to a particular person to do a thing if he wished, but did not bind him to do it. The Legislature might well have said, and I think ought to have said, that the amount of the liability of those who are contributory to this charge shall not depend on your valuation; and if the circumstances of Belfast or Dublin are such that it is decided that there should be a new valuation, well, do it for your own benefit, but you will not injure or alter the rights of others by so doing.

What has been done? "When any part of a union is within and part without any county borough, in respect of which a revaluation is made under this section, the total amount to be raised for union charges in that union shall be apportioned between each such part of the union in a proportion to the rateable value of each part at the date when the revaluation under this section came into force."

"In proportion to the rateable value." Now it is a logical thing to fix liability according to the proportion of the rateable value of things that have been valued on the same principle of valuation. But it is illogical to fix the liability on a rateable value, when the rateable value of one part is on one principle, and of another on another; and therefore bearing in mind that this is a privilege given to the Corporation of Belfast, and therefore ought not to be such as to alter the law as between them and their contribution, if you have a liability to depend, not on the proportions of one common valuation as they then existed, but on the proportion of one as to the former valuation, and the other as to another valuation, you are running the risk of gambling that the valuation might be lessened, and therefore that this liability of the other party might be increased. That is a most illogical construction; but then I am not afraid to take the exact words of the section. I admit that when two acts are to take place at the same moment of time, or at successive moments of time, in point of law, you are obliged to determine which act is to be deemed first in point of time. I had to consider this very carefully in some cases under the Finance Act, and the rule is to depend upon the nature of the things that are to be done and the purposes for which they are to be done. There is here to be a change in the valuation. A new valuation is to come into force. It is to come into force at a particular moment. Before that moment arrives, there is another valuation in existence, and that valuation is in existence when the other comes into operation and supersedes it. Therefore, I am of opinion that the mere words of the section are in favour of Mr. Ronan's contention. But I am far more impressed with the object at which this is directed.

It is something that is to be stereotyped for five years at least, and perhaps for a great deal more. For five years at least there is to be no annual revision. As far as I can see there can be no annual revision until there be a new general

revision ; because, although the powers of the Local Board are limited to five years, there is no provision for an annual valuation after these five years, and the words, "when the revaluation under this section came into force," seem to imply until something occurs which changes it. It seems to me that there is to be an end of annual revisions until that time, and that is the general revision under sect. 34, because that revision is to supersede the revision in sect. 62, and then undoubtedly the annual valuation will come into operation again; and the fact that changes might have been made upon the annual revisions prior to the coming into force of this general valuation is excluded from the consideration of the commissioner, who is to take into account only the subsequent changes in the value of the hereditaments.

I therefore have a change in the general principle of the valuation law. I have the reasons of that change which, in my opinion, was the additional power that was given to the corporation. As far as I can see, every effort was made to guard the contributory areas from any greater liability being thrown upon them. It may be that the effect of that is different from what was anticipated by the Legislature. But I am wholly unable to adopt Mr. Brown's construction. I am therefore of opinion that we ought to make no rule upon the application for certiorari.

As to the form of order, I think we ought to direct Mr. O'Brien to take a note that Mr. Brown undertakes that he will issue a writ of summons against the Corporation of Belfast for the purpose of recovering the amount in this demand-note, and that the parties will, within a reasonable time, state a case raising the exact question which has been argued and which has been decided by us, and thereupon we will put it into the list, and without argument we will pronounce judgment, which will give the parties the right to go to the Court of Appeal.

ANDREWS and JOHNSON JJ. concurred.

Solicitor for the appellant: *H. A. Wynne*, Chief Crown Solicitor.

Solicitor for the Corporation of Dublin: *Ignatius J. Rice.*

Solicitor for the Dublin County Council: *W. J. Shannon.*

C. L.

Barton J.
1917.
May 4, 11.

In re GIBBONS.
D'ALTON *v.* GIBBONS.

Will—Trust—Charity—Bequest to executors for the testator's "best spiritual advantage."

Gift, in the will of a Roman Catholic clergyman, of residue to the testator's executors, who were also Roman Catholic clergymen, to dispose of it "to my best spiritual advantage, as conscience and sense of duty may direct,"

Held, not charitable, but a lawful trust which the executors might execute.

Summons.

The testator, the Very Rev. Edward Canon Gibbons, late of Balla in the county of Mayo, Parish Priest of Balla, by his will dated the 16th May, 1901, having made certain bequests not material to the present report, appointed the Very Rev. Edward Canon D'Alton and John Gibbons to be his executors, and disposed of his residuary property in the words following:—"I appoint my executors residuary legatees to dispose of my residuary property, if any, to my best spiritual advantage, as conscience and sense of duty may direct." The testator died on the 12th day of May, 1905.

The executors proposed to apply the moneys constituting the residuary estate for the purpose of the building of the Parish Church of Balla and founding at that church perpetual masses for the repose of testator's soul, this being the manner in which the executors considered they could most appropriately dispose of the fund to the best spiritual advantage of the testator. Doubts, however, were suggested as to whether the gift was valid and legal, or whether the residue passed as on intestacy to the next-of-kin. With the exception of Rev. John Gibbons, the executor, there were no next-of-kin with whom the executors could communicate. The testator in his will stated that he had had two married sisters, both dead—Mrs. Burke and Mrs. Delaney—and made the following provision:—"The former reared a family for the most part in England, whom I have not seen; the other died after giving birth to a son, who is now a lawyer in America; to any

of those who should appear as a claimant I bequeath one shilling, I owe them nothing." The executors caused inquiries to be made, but failed to trace any of the descendants of Mrs. Burke or of Mrs. Delaney. The plaintiff, Canon D'Alton, one of the executors, brought the present summons to obtain the decision of the Court as to the validity of the residuary gift in the will. In his affidavit he stated it to be the intention of the executors, if the residuary gift should be declared to be good, to apply the money for the building of the Parish Church of Balla and the founding of perpetual masses for the repose of the testator's soul. An affidavit was also made by the Rev. Jeremiah Kinnane, Professor of Canon Law, Maynooth, explaining the doctrines of the Roman Catholic Church with reference to the dead and the benefits to be conferred on the dead by the acts of the living. The defendant, Rev. John Gibbons, did not appear in the case and took no part in the argument.

Hugh Kennedy, for the plaintiff :—

This was an absolute gift to the executors. The testator did not impose a legal trust, but only a precatory request or moral obligation. The words, "as conscience and duty may direct,' show that the testator did not fix on the legatees any obligation enforceable in law. The tendency of the Courts is against precatory trusts: *In re Williams* (1). Alternatively, the plaintiff submits that this is a good charitable trust, and this view will be argued by counsel for the Commissioners of Charitable Donations and Bequests. Assuming this not to be a good charitable trust, it is a good private trust; and it does not offend against the rule against perpetuities, because the trust must be exercised by the executors in their lifetime, as they must apply their conscience and duty in carrying out the trust. The object of the trust is sufficiently indicated and is definite, as the money must be spent in one of the four ways mentioned in the affidavit of Dr. Kinnane. Although there is no one to enforce the trust, the next-of-kin could not interfere with the discretion of the trustees, and if the executors do not, in their lifetime, exhaust the fund, the balance will go to the next-of-kin: *In re Dean* (2).

(1) [1897] 2 Ch. 12.

(2) 41 Ch. D. 552.

Barton J.
1917.

D'ALTON
v.
GIBBONS.

J. H. Pigot K.C. (with him *T. Henry Maxwell*), for the Commissioners of Charitable Donations and Bequests:—

The words of the will clearly create a trust. The only question is, whether this is a charitable trust or nothing. A trust is an "equitable interest in property based on confidence, over which Courts of Equity alone have full jurisdiction": *Wilson* v. *Lord Bury* (1). The Court cannot act of its own motion to protect a trust. If no one exists to move the Court there is no enforceable trust, and no trust at all. But if a charitable trust were created by these words, such trust is always represented by the Attorney-General. If not a trust, it is only an authority or an authorized power. If the Court is satisfied that the words are equally capable of creating on the one hand an enforceable obligation or valid charitable gift, and on the other an authorized power, then the Court will lean in favour of the construction which would give it authority to administer the trust, i.e. in favour of the construction of a valid charitable trust. Possibly in England this would not be a good charitable trust, but, according to the Irish decisions, in Ireland, where there is no Established Church, the Court will not weigh the views taken by the various Churches, but will accept the doctrines of the authorities of each Church: *Attorney-General* v. *Hall* (2). "The Court must take as its guide the belief of the Church of which the testator was a member": per Holmes L.J., in *O'Hanlon* v. *Logue* (3).

The words used in the will are "best spiritual advantage." The Court must give full effect to the word "best." According to the affidavit of Dr. Kinnane souls in purgatory can be benefited in any of four different ways, viz.: 1, Masses; 2, Prayers; 3, Alms; 4, Opera pietatis. If the trustees had power to exercise the charity in any one of the four different ways, the gift might be applied for non-charitable purposes; e.g., it might be handed over to contemplative or praying nuns, which would not be a good charitable object, and, therefore, the whole gift would be bad as a charity. The obligation on the trustees is to apply the fund for either the first or third of the purposes mentioned, and either of these is charitable. According to the decree of the Council of

(1) 5 Q. B. D. 518, at p. 531. (2) [1897] 2 I. R. 426.
(3) [1906] 1 I. R. 247, at p. 286.

Trent the saying of masses is "potissimum," and probably is what the testator meant, when he used the words "best spiritual advantage." Lacroix says that the giving of alms may, in certain circumstances, be of equal efficacy with masses, but that prayers and opera pietatis are not of equal efficacy. The testator, by the use of the word "best," excluded private prayers and opera pietatis. Even if the word "best" were not used, the trustees would be under an obligation to carry out the trust for the best spiritual advantage of the testator. The testator reposed confidence in them as clergymen of his own Church to see that his intention was carried out in accordance with the tenets of that Church.

Further, a gift for opera pietatis may be construed as a good charitable gift. A gift "for religious purposes" is a good charitable gift: *Townsend* v. *Carns* (1). A gift "for charitable and pious uses" is good: *Attorney-General* v. *Herrick* (2). "Pious uses are a branch of charity": *per* Manners L.C. in *Powerscourt* v. *Powerscourt* (3). "Pious," in the English language, has a more extended meaning than "pietas." "Pietas" connoted originally a recognition of an obligation due to the gods. In addition to its present theological meaning there are some derivative meanings, such as obligations due to the dead or to one's country. But in the Council of Trent the words "opera pietatis" clearly mean works of obligation due to God, and have not any of the secondary meanings. There are no acts done for the glory of God which would not be charitable, or for the advancement of religion. Therefore, a gift for "opera pietatis" is a gift for the advancement of religion, and charitable.

The testator clearly intended no intestacy, because he has mentioned next-of-kin in his will, whom he expressly says he did not wish to benefit. Therefore, the Court will not put such a construction on this will as would defeat the testator's intention by creating an intestacy.

Devitt, for the Attorney-General, appointed by the Court to represent the next-of-kin:—

The testator did not intend his executors to take beneficially, for he gives direct legacies to his executors. He clearly intended

(1) 3 Hare 257. (2) Ambl. 712. (3) 1 Molloy 616, at p. 618.

Barton J. 1917. D'ALTON v. GIBBONS.

a trust when he gave his residue for his spiritual advantage. The gift in the will means that the executors were to spend the money in whatever way they might think best for the benefit of the testator's soul. The Court cannot add words which are not in the will—"according to the views of the Roman Catholic Church." I submit that the gift is void. How can the Court ascertain what particular ways the trustees might select to carry out the trust? These ways might not be charitable: *M'Laughlin* v. *Campbell* (1). The trustees, having their own discretion and duty, cannot be confined to charitable purposes: *Laverty* v. *Laverty* (2). Unless the Court can say that this testator intended the trustees to use their discretion in certain defined charitable ways the gift is not charitable, and is void for uncertainty.

A merely philanthropic gift is void for uncertainty: *Morice* v. *Bishop of Durham* (3); *Laverty* v. *Laverty* (2). The word "best" does not confine the executors to masses, for, in particular circumstances, the best way would be by alms. Among "opera pietatis" might be instanced works which are not charitable; e.g., publication of books for Roman Catholic purposes. In the "horse" cases the trust was definite: here there is no particular trust. There is, therefore, a resulting trust for the next-of-kin.

Cur. adv. vult.

BARTON J. (after referring to the terms of the will and the evidence, proceeded):—

This bequest cannot in my opinion be regarded as a beneficial gift to the executors. When the testator said that he appointed certain persons to dispose of money in a particular way, he meant that it should not be disposed of in any other way. It is a trust, and the question is whether it is a valid and lawful one. No question under the rule against perpetuities arises, because the money is to be disposed of in the lifetime of the executors. In England the bequest would not be valid; but the law in Ireland with reference to bequests for such purposes as masses is different from the law in England, and this case must be decided in accordance with the Irish authorities.

(1) [1906] 1 I. R. 588. (2) [1907] 1 I. R. 9. (3) 9 Ves. 405; 10 Ves 521.

The words of the bequest as explained by the evidence might include non-charitable purposes. It is, therefore, not a charitable trust in the legal sense of that term. The question remains whether it constitutes a valid private trust. The objections which have been urged against its validity as a private trust are that it is too indefinite, and that there is no cestui que trust to enforce it. In my opinion the affidavit of the Rev. Professor Kinnane leaves no room for uncertainty. The range of purposes to which the money is applicable is wide, but it is not indefinite. It is true that there is no living cestui que trust who can enforce it. The same objection has sometimes been made unsuccessfully to the validity of a bequest for erecting a monument to a testator. Upon that subject reference can be made to what was said by North J. in *In re Dean* (1) at p. 557, and to *Mellick's Case* (2), and *Roche* v. *M'Dermott* (3). The Court is not asked to compel the enforcement of this trust. The executors are willing to carry it out; and I see no sufficient ground for refusing to allow them to effectuate, as they propose to do, the expressed intentions of the testator.

As the next-of-kin are not within reach, and are represented by the Attorney-General, I direct that the Attorney-General should be consulted at the expense of the estate as to the question of an appeal from my decision. If he considers the decision doubtful, an appeal should be taken.

Solicitor for the plaintiff: *E. P. O'Flanagan.*

Solicitor for the Commissioners of Charitable Donations and Bequests: *J. M. Maxwell.*

Solicitor for the Attorney-General: *M. J. O'Connor & Co.*

D. M. S.

(1) 41 Ch. D. 552, at p. 557.
(2) Jac. 180, at p. 184.
(3) [1901] 1 I. R. 394, at p. 399.

Barton J.
1917.
March 9, 14.

Appeal.
June 22.

MASTERSON *v.* O'HALLORAN.

Will—"Realize."

A will, under which the defendant took and accepted considerable benefits, contained the following provision:—"If the mortgage should be realized which E. L. O'H. (the defendant) has on the lands of S. she is to pay to her sister (the plaintiff) £200." The defendant instituted proceedings in the High Court of Justice, Chancery Division, to raise the amount of the mortgage, and the lands comprised in the mortgage were sold. The proceeds were insufficient to pay off the mortgage debt (£1900) in full, and a sum of £182 still remained due.

Held, by the Court of Appeal (reversing Barton J.), that the mortgage had not been "realized."

TRIAL OF ACTION.

The testatrix, Margaret Mallon, appointed her daughter, Elizabeth Lena O'Halloran, the defendant, one of her residuary legatees, and bequeathed to her property of considerable value. The plaintiff, Annie Masterson, was also a daughter of testatrix. The will contained the following provision:—"If the mortgage should be realized by Elizabeth Lena O'Halloran, which she has on the lands of Spring Park and Spring Vale, now in the occupation of John Masterson, of Coolarty, she is to pay to her sister, Annie Masterson, £200."

The defendant accepted the benefits conferred on her by the will. Proceedings in respect of the mortgage referred to in the will were instituted by the defendant in a suit entitled 1913, No. 346, in the High Court of Justice in Ireland, Chancery Division, Master of the Rolls. Pursuant to an order made in the suit on the 3rd May, 1913, the lands comprised in the mortgage were sold in or about August, 1914. The proceeds, after payment of the costs of the suit, were insufficient to pay off the mortgage debt of £1,900 in full, and a sum of over £182 7*s.* 1*d.* still remained due to the defendant in respect of the mortgage. The plaintiff claimed a declaration that in the events which had happened, the defendant became and was now liable to pay to the plaintiff the sum of £200.

The defendant's case was that the plaintiff was not entitled to be paid any sum by the defendant, unless and until the defendant received the full amount due on the mortgage.

H. Wilson K.C., and *Farrell*, for the plaintiff.
Littledale K.C., and *Devitt*, for the defendant.

The arguments were similar to those in the Court of Appeal.

Cur. adv. vult.

March 14.

BARTON J.:—

The plaintiff, Mrs. Masterson, and the defendant, Mrs. O'Halloran, are sisters, and are daughters of the late Mrs. Margaret Mallon. The plaintiff seeks a declaration that in the events which have happened the defendant is now liable, under the provisions of Mrs. Mallon's will, to pay to the plaintiff the sum of £200.

The husband of the plaintiff, Mr. Masterson, was possessed of certain lands of Coolarty upon which he and the plaintiff resided. The defendant, Mrs. O'Halloran, obtained judgments against Mr. Masterson, and registered them as mortgages against the interests of Mr. Masterson and of the plaintiff in these lands, and upon the 3rd of May, 1913, the defendant, Mrs. O'Halloran, obtained an order in the Court of the Master of the Rolls declaring her two judgment mortgages well charged upon the interest of Mr. Masterson and of the plaintiff in those lands, with an order for sale, and the usual accounts and enquiries.

While the suit was proceeding, Mrs. Mallon made her will dated 30th April, 1914, by which, besides taking other benefits, the defendant, Mrs. O'Halloran, was made one of the residuary legatees. By the will the testatrix gave the following direction imposing a burden on defendant in favour of plaintiff:—"If the mortgage should be realized by Elizabeth Lena O'Halloran, which she has on the lands of Spring Park and Spring Vale, now in the occupation of John Masterson, of Coolarty, she is to pay to her sister, Anne Masterson, the sum of £200."

The testatrix died on the 1st May, 1914, without having revoked or altered her will, and the defendant, Mrs. O'Halloran, accepted and took the benefits conferred upon her by the will.

Barton J.
1917.
MASTERSON
v.
O'HALLORAN.

In August, 1914, the sale of the mortgaged premises was effected in the Rolls Court for the price of upwards of £1300. A chief clerk's certificate was filed on the 5th November, 1915, finding that £1126 2*s.* 4*d.* and £83 19*s.* 5*d.* was due to defendant on foot of her two mortgages for principal and interest, making in all £1210 1*s.* 9*d.* On December 15th, 1915, the purchase-moneys of the lands were allocated. After deducting auctioneer's remuneration, some arrears of purchase-annuity due to the Irish Land Commission, and some arrears of rates, the net sum available for discharge of Mrs. O'Halloran's mortgage was £1027 14*s.* 8*d.*, leaving a sum of £182 7*s.* 1*d.* still due by the mortgagor to the mortgagee.

The plaintiff claims that the defendant, Mrs. O'Halloran, is now liable to pay the plaintiff £200, because the mortgage which she had on the lands in question has been realized. The defendant submits—1, that the will did not impose upon her any obligation to pay the £200; and 2, that if it did impose an obligation upon her to pay the £200 in the event of the mortgage being realized, that event has not happened, because the sale of the land has not produced a sum sufficient, after all just credits and allowances, to discharge the mortgage debt in full.

As regards the question of defendant's liability, I agree with the view presented at the bar that the case does not depend upon the equitable doctrine of election. It rather depends upon the simple principle that a person who chooses to accept a benefit under a will must accept it cum onere, if such can be shown to have been the intention of the testator. The case in that respect is not unlike *In re M'Mahon* (1), where a testator devised a farm to his son, and in the will directed his son to give his daughter £350. The Vice-Chancellor held that the only reasonable construction was, that the legacy of £350 was a personal obligation on the son, subject to which he was to take the farm. He added:—"He was not forced to accept the gift; but it is quite clear that he has actually accepted it. The fact of his acceptance of the gift, which I hold to be subject to this condition, makes him personally responsible for the payment of the £350 to the testator's daughter." In my opinion the defendant is personally

(1) [1901] 1 I. R. 489.

liable to pay the sum of £200, if the mortgage has been realized within the meaning of the will. *Barton J.* 1917. MASTERSON v. O'HALLORAN.

That brings me to the second question—Has the mortgage been realized? In my opinion it has been realized. The ordinary meaning of the word "realize" in connexion with securities or property of any kind is "to convert the property into money" (Oxford Dictionary, VIII, 203). I agree that the word might bear a secondary meaning, viz., "to obtain payment of the mortgage debt in full," if the context and surrounding circumstances supported such a contention. But I can find nothing in the present case to justify the Court in putting any other than the ordinary meaning on the words. This was not a business contract, but a testamentary disposition by a mother in favour of a daughter. If the mortgage should be realized by sale of the property, the plaintiff would lose a house, and the mother intended that, in that event, she was to receive this sum from her sister, the mortgagee, who was obtaining ample benefits under the will.

In my opinion, the plaintiff is entitled to judgment; and the costs must follow the result.

D. M. S.

June 22.

The defendant appealed to the Court of Appeal (1).

Littledale K.C. and Devitt, for the appellant:—

The lands realized a sum which would have been sufficient to pay the defendant but for the fact that the amount made available by the sale was depleted by payment of arrears of annuity to the Land Commission, and of rates which, through the failure of the plaintiff to discharge the obligations attached to the land, had been allowed to accumulate. In these circumstances it is not open to the plaintiff to say that the mortgage has been realized. We submit that a mortgage is not realized until there has been a payment in full of the debt due. The case of *In re M'Mahon* (2), relied upon by Mr. Justice Barton, does not support the claim made here by the plaintiff.

It is also submitted, on the authority of *In re Elliott* (3), that there was no gift of £200 to the plaintiff.

(1) In the Court of Appeal, before SIR IGNATIUS J. O'BRIEN C., and RONAN and MOLONY L.JJ.

(2) [1901] 1 I. R. 489.

(3) [1896] 2 Ch. 353.

Appeal.
1917.
MASTERSON
v.
O'HALLORAN.

H. Wilson K.C. and *Farrell*, for the respondent:—

The mortgage was on the lands of Spring Park and Spring Vale. Mortgage in this case meant the mortgaged property, and when that was converted into money the mortgage was realized. There was no personal liability imposed on the mortgagor. In *National Provincial Bank of England* v. *Games* (1), Fry L.J., dissenting from the view that a mortgagee has two distinct positions—that of a creditor and that of a person holding a security, and that what he does in respect of a surety who has given a promissory note is done by him in the character of a creditor simply, not in that of mortgagee, and is not chargeable against the mortgaged property—says, "A mortgagee is a creditor; he has also a security for the debt, and whether he is trying to get his money from the mortgagor, or from a surety, or out of the mortgaged property, he is trying to enforce his rights as mortgagee." Sect. 24 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), imposes upon a bankrupt the obligation to aid to the utmost of his power in the "realization of his property, and the distribution among his creditors." A bankrupt refused to submit to a medical examination in order that a policy might be effected on his life. The proposed policy would have enhanced the value of the bankrupt's property available for distribution, yet it was held that the section in question did not impose on the bankrupt an obligation to submit to a medical examination: *Board of Trade* v. *Black* (2).

SIR IGNATIUS J. O'BRIEN C.:—

The question in this case turns upon a very short clause in a will. It appears that the plaintiff, who seeks to make the defendant liable for a personal debt of £200, was herself at the time of the testatrix's death indebted to the defendant, Elizabeth Lena O'Halloran, to the extent of £1300, secured by two judgment mortgages on the lands of Spring Park and Spring Vale. A suit to enforce payment was pending when Mrs. Mallon made her will, and in that document she refers to the matter in these words. [His lordship read the passage in will.] What the testatrix meant by the phrase, "If the mortgage should be

(1) 31 Ch. D. 582, at p. 594. (2) 13 App. Cas. 570.

realized," was, I conceive, payment in full of the amount due under the mortgage debt to the defendant. In case the defendant recovered the entire of this debt she was then to pay £200 to the plaintiff. The amount realized by the sale of the lands which comprised the security was not sufficient to discharge the mortgage, and, roughly, a sum of £200 is still due to the defendant.

If, in these circumstances, the will was to be construed as Mr. Justice Barton has construed it, the result would be that Mrs. Masterson should be paid £200 by the defendant, although, at the same time, she owed the defendant £200. "Realize," applied to a mere charge, may simply mean selling the lands, but when the expression is used in reference to a mortgage it must mean, both in popular and technical language, payment in full of the debt due. It would be an unnatural and absurd construction of this will to hold that, if the sale realized only one penny or £100, the defendant would still be liable to pay the £200.

It is unnecessary to consider the case of *In re M'Mahon* (1), relied on by Mr. Justice Barton. It is a perfectly isolated case for the proposition laid down, and it is enough for me to say that I am not to be taken as assenting to the view that the decision is right.

For the reasons stated I am of opinion that the judgment of Mr. Justice Barton must be reversed.

RONAN L.J.:—

I agree with the Lord Chancellor, and I think it is not necessary in this case to express any opinion on the decision of the Vice-Chancellor in *In re M'Mahon* (1). [Having stated the facts, his lordship proceeded]: It is said that the true intention of the will is that the defendant must pay the plaintiff £200, and that the defendant cannot recover the £200 which the plaintiff owes her. I cannot put this construction upon the words of the will.

Under the heading of "Mortgage," I find in Stroud: "What is a mortgage? Everybody knows it consists of two things: it is a personal contract for a debt secured by an estate; and, in equity, the estate is no more than a pledge or security for the

(1) [1901] 1 I. R. 489.

Appeal. 1917. MASTERSON *v.* O'HALLORAN. Ronan L.J.

debt. The debt is the principal; the estate is the accident." Mr. Wilson asks us to ignore the debt, and to hold that it and not the security is the accident.

When the plaintiff owes the defendant £200, and sues the defendant for a like sum, supposed to be due to her, one debt is not to be paid, and the other cancelled. The will plainly means that if the defendant was paid the entire mortgage debt she should in that event give £200 to the plaintiff. So far as it relates to the meaning of "realize," the judgment of the Court below ought to be reversed.

MOLONY L.J.:—

The testatrix was the mother of the plaintiff and the defendant, and she wished, in certain events, to give benefits to each of them. She knew, of course, that there was a debt due by Annie Masterson and her husband to Elizabeth Lena O'Halloran, and she appears to have known that at the time she made her will proceedings were pending to realize the amount of the debt.

In these circumstances she made a disposition which meant that if Mrs. O'Halloran was paid her debt in its entirety she should pay her sister £200. Undoubtedly the passage in the will which we are asked to interpret does not mean that the plaintiff should get £200 if the debt was only partly realized out of the mortgaged property. What the testatrix intended was that if the entire of the money due came into the hands of the defendant she should in that event, and in that event only, pay £200 to the plaintiff. It was never contemplated that Annie Masterson should be given £200 by the defendant, when at the same time she owed £200 to the defendant.

I consider it unnecessary to say whether, if the amount had been realized, it would have been possible to give effect to the provision in the will. I think, however, there is a great deal to be said in support of the judgment in *In re M'Mahon* (1); but in the present case we are not called upon to examine or review it. On the terms of the will alone, and in the circumstances of the case, we have no option but to dismiss the action.

Solicitor for the appellant: *C. Friery.*

Solicitor for the respondent: *C. J. P. Farrell.*

C. L

(1) [1901] 1 I. R. 489.

BLOUNT *v.* CROZIER.

Barton J.
1917.
March 9, 23.

Will—Vesting—Gift to husband of Unmarried Daughter.

A devise or bequest "to the husband of A.," if there be no such person, either at the date of the will, or at the death of the testator, applies to the person who shall first answer the description of husband at any subsequent period.

A testator bequeathed securities to trustees upon trust to pay the income to his grand-daughter for her sole and separate use, free from the debts, control, or engagements of any husband she might marry; and from and after her death upon trust to pay the annual income to her husband surviving her for his life; and as to the capital thereof upon trust, after the death of the survivor, for her children or remoter issue; and in default of such issue becoming entitled, then upon trust as to £10,000 for such person or persons as she should by will or deed appoint, and, subject thereto, upon trust to pay the unappointed portion of the £10,000 and the residue to the children of the testator's nephews. The testator's granddaughter, subsequent to testator's death, married a husband, who predeceased her. There was no issue of the marriage. Having appointed the £10,000 to herself absolutely, and having attained the age of fifty-nine years, she applied that the £10,000 should be raised and paid to her.

Held, that she was entitled to the order sought.

ORIGINATING SUMMONS.

The summons was brought by Mrs. Mary Jane Blount (*née* Whyte), widow of the late Robert Martin Blount. The question submitted to the Court was whether, according to the true construction of the will of her grandfather, Thomas Laffan Kelly, deceased, and in the events which happened, and having regard to the fact that the applicant was now a widow and over the age of fifty-nine years, and had never had any issue, she was entitled to the immediate payment of the sum of £10,000 out of the trust funds and property subject to the trusts of the said will.

By the will, dated the 24th day of March, 1883, Thomas Laffan Kelly, reciting that he was possessed of the several stocks, shares, funds, moneys, and securities thereinafter mentioned, and was desirous of making a provision for his grand-daughter, Mary Jane Elizabeth Whyte (the applicant), bequeathed the

Barton J. 1917. BLOUNT v. CROZIER.

stocks, shares, moneys, funds, and securities therein mentioned unto trustees upon trust, to stand possessed of same upon trust after certain payments, and in the events which afterwards happened to pay the dividends, interest, and income thereof to his said grand-daughter upon her own receipt, for her sole and separate use, free from the debts, control, or engagements of any husband she might marry, with consent as therein provided, and with a restraint upon anticipation; and from and after death upon trust to pay the annual interest, dividends, and income thereof to her husband surviving her for his natural life; and as to the capital thereof upon trust, from and after the death of the survivor of them the said applicant and her husband, for the children or remoter issue of the applicant as therein provided; and, in default of such issue becoming entitled to the funds, then upon trust as to £10,000 thereof for such person and persons, and for such intents and purposes as the applicant should by deed or will appoint, and, subject thereto, upon trust to pay and transfer the unappointed portion of said £10,000, and the residue of such stocks, shares, funds, moneys, and securities in moieties among the children of the testator's nephew, Thomas Aliaga Kelly, and the children of his nephew, Frederick Challoner Kelly, in equal shares and proportions.

The testator died on the 29th of November, 1883. The applicant on the 9th of June, 1892, married Major Robert Martin Blount, who died on the 15th April, 1902. There was no issue of the marriage. By various deeds-poll the applicant appointed the £10,000 to herself for her absolute benefit. She was now fifty-nine years and eleven months old.

Jellett K.C. (with him *O. Murphy*), for the applicant:

We rely on the third of the three rules laid down in Jarman on Wills (6th edition), at p. 398:—"First, a devise or bequest to the wife of *A*, who has a wife at the date of the will, relates to that person, notwithstanding any change of circumstances which may render the description inapplicable at a subsequent period, and, by parity of reasoning, is under all circumstances confined to her; secondly, if *A* have no wife at the date of the will, the gift embraces the individual sustaining that character at the death of the testator; thirdly, if there be no such person either at the date

of the will or at the death of the testator, it applies to the woman who shall first answer the description of wife at any subsequent period": *Radford* v. *Willis* (1); *In re Laffan & Downes' Contract* (2). The case of *Pippin* v. *Bickford* (3) is distinguishable. Jarman at p. 399 says with reference to that case:—"The construction must, it is conceived, be referred to the special circumstances of the trust being executory . . . ." Mrs. Blount being now sixty years of age, and entitled both to the capital and income, claims that the whole be paid to her by the trustees.

T. S. M'Cann, K.C., for Mrs. Walsh and the other persons entitled to the residue:—

Jarman's third proposition must be limited strictly to vested interests, and is controlled by the context and intention appearing on the face of the will. Here the gift is only to the husband in the event of his surviving her: *Driver* v. *Frank* (4); *In re Lory* (5); *Longworth* v. *Bellamy* (6); *In re Morrison* (7). The applicant is sixty, but the Court will not presume impossibility of issue where such a presumption would be to the detriment of third parties: *Thornhill* v. *Nixon* (8). Such a presumption is only made where it is for the benefit of the lady herself, and does not interfere with the rights of living persons: *In re Hocking* (9). The intention appearing in the will was that the £10,000 should not be raised until the death of the applicant. The Court will never accelerate the execution of powers to the detriment of third parties: Farwell on Powers, p. 175; *Truell* v. *Tysson* (10).

O. Murphy, in reply:—

This is not an acceleration, but a state of circumstances where the life interest of Mrs. Blount is merged in the fee. The persons interested in the residue will not suffer a legal injury, but only a loss, because they have no interest in the £10,000. The principle laid down in *In re Hocking* (9) has no application to the present case, for the only person who might be injured is a possible future

(1) L. R. 7 Ch. A. 7.
(2) [1897] 1 I. R. 469.
(3) 3 Ves. 570.
(4) 3 M. & S. 25; 8 Taunt 468.
(5) 7 T. L. R. 419.
(6) 40 L. J. Ch. 513.
(7) 40 Ch. D. 30.
(8) [1904] W. N. 112.
(9) [1898] 2 Ch. 567.
(10) 21 B. 444.

Barton J. 1917. BLOUNT v. CROZIER.

husband, but not the persons entitled to the residue: *In re White* (1). Jarman's propositions were approved of by Sir A. M. Porter M.R. in *In re Laffan* v. *Downes' Contract* (2), and by Romer L.J. in *In re Coley* (3). There is nothing inconsistent in a gift of a life estate to the first husband followed by a gift to the children by any husband: *In re Coley* (3). The words "independently of the control of any husband" occur in *Radford* v. *Willis* (4), relied on for Jarman's three propositions.

Cur. adv. vult.

March 23. BARTON J. [Having stated the facts as above, the learned judge continued:—]

The applicant has appointed the £10,000 to herself, and now wishes to have the £10,000 paid out to her. She is fifty-nine years of age, and has never had any children. The children of the testator's two nephews, who will be entitled to the residue of the trust property, object to a realization at present, when many of the securities have fallen owing to the war. I do not think that they can successfully object if, upon the construction of the will, the applicant's title is now complete. The argument has principally turned upon the question whether under the will, in the event of the applicant marrying again, her second husband would be entitled to a life interest in the income of the trust property.

The applicant relies upon the third of three rules which Mr. Jarman deduces from the authorities upon the subject of "devises or bequests to the wife (or husband) of A.," which is to the effect that if there be no such wife or husband either at the date of the will or at the death of the testator, the devise or bequest applies to the woman (or man) who shall first answer the description of wife (or husband) at any subsequent period. They submit that in this case this gift applied to Major Blount, and that as the applicant has survived him the bequest is spent, and could not apply to any second husband although he might survive her. On the other hand, it has been argued that the words "husband surviving her" mean any husband surviving her, or will be answered by the person, whether first or second or other

(1) [1901] 1 Ch. 570.
(2) [1897] 1 I. R. 469.
(3) [1903] 2 Ch. 102.
(4) L. R. 7 Ch. A. 7.

husband, who ultimately answers the description of husband surviving her. The applicant relies upon *Radford* v. *Willis* (1), and Mr. M'Cann sought to distinguish it on the ground that that was a vested estate of inheritance in fee. But this is a vested estate of inheritance. It is true that the remainder for life to applicant's husband might never take effect, and could only take effect if he survived her. But the uncertainty of a remainder ever taking effect in possession does not make the remainder contingent. The right is not contingent, although its future enjoyment may never accrue. Accordingly, I have to see whether there is sufficient in the context to take the case out of the general rule, which is too well settled for a Judge of first instance to gainsay it. If this had been an executory trust, *Peppin* v. *Bickford* (2) and *Nash* v. *Allen* (3) would be in point. But there is nothing executory about this trust. The fact that all the children of the applicant by any marriage were to take, after the death of the survivor of the applicant and her husband, affords an argument in favour of holding that the gift applies to a second husband, and in *In re Lyne's Trusts* (4) which was not dissented from by Stirling J. in *In re Drew* (5), Malins V.-C. acted on that view. But that case has not been followed: see *In re Griffith's Policy* (6) and *In re Coley* (7). Those were cases coming under the first of Mr. Jarman's three rules, but they weaken the force of the same argument as applied to the present case.

I am unable to say that there is enough in the context of this will to take it out of the general rule, and I, therefore, think that the application should be granted.

Solicitors for the applicant: *Thomas Crozier & Son.*
Solicitors for Mrs. Walsh: *Maxwell & Weldon.*

D. M. S.

(1) L. R. 7 Ch. A. 7.
(2) 3 Ves. 570.
(3) 42 Ch. D. 54.
(4) L. R. 8 Eq. 65.
(5) [1899] 1 Ch. 336.
(6) [1903] 1 Ch. 739, at p. 742.
(7) [1903] 2 Ch. 102.

Appeal.
1917.
June 21.

IN THE MATTER OF THE ESTATE OF THOMAS B. PONSONBY (1).

Land Purchase Acts—Superior Interest—Redemption of—Agreement—Fixing Price—Time—Irish Land Act, 1903, *sect.* 64—*Land Purchase Acts Rules*, 2*nd July*, 1910, *Order* 8, *r.* 4.

For the redemption under the Land Purchase Acts of a superior interest in normal conditions two orders are requisite—one an order for redemption; second, an independent order, fixing the redemption price. The parties had, in 1914, entered into a formal consent agreeing upon the price; but no order for redemption had been made.

Under Order 8, rule 4, of the Land Purchase Acts Rules of the 2nd July, 1910, the time for parties to agree upon the redemption price of a superior interest is "within one month from the date of the order for redemption."

Held, that the time prescribed by the rule is within a period of one month, commencing with the date of the order for redemption, and ending one month from that date, and that the consent did not comply with the rule.

APPEAL by Mrs. Ellen Bevan Spear Walsh, the owner of a fee-farm rent of £362 6*s.* 2*d.*, payable out of part of the lands of the vendor, Thomas Brabazon Ponsonby, against an order of Mr. Justice Wylie, dated June 11th, 1917, on the ruling of the final schedule of incumbrances, refusing to make a consent dated May 14th, 1914, between Mrs. Walsh and the vendor a rule of Court. By a fee-farm grant, dated July 30th, 1913, made between the vendor and Mrs. Walsh, pursuant to the provisions of the Renewable Leasehold Conversion Act, Mrs. Walsh held from the vendor a dwellinghouse at Kilcooly, Co. Tipperary, and lands attached to the extent of 165 Irish acres, subject to the yearly fee-farm rent of £63 9*s.* 10*d.* By another fee-farm grant of the same date Mrs. Walsh granted the same premises to the vendor, subject to the yearly fee-farm rent of £362 6*s.* 2*d.* The lands comprised in these grants were sold under the Land Purchase Acts, and on May 4th, 1914, the vendor and Mrs. Walsh entered into a consent that the fee-farm rents should be redeemed, that of

(1) Before SIR IGNATIUS J. O'BRIEN C., and RONAN and MOLONY L.JJ.

£63 9*s.* 10*d.* at £1,714 5*s.* 6*d.*, being twenty-seven years' purchase thereof, and that of £362 6*s.* 2*d.* at £8,333 1*s.* 10*d.*, being twenty-three years' purchase thereof, the said sum of £1,714 5*s.* 6*d.* to be charged upon and payable out of the sum of £8,333 1*s.* 10*d.* It was sought to make this consent a rule of Court.

Leech K.C., for the appellant:—

The point is whether the judicial commissioner has power to vary the formal consent of the parties, agreeing as to the amount of the redemption price, and to fix a different sum from that agreed upon by the parties themselves. It is now the practice in the Land Commission not to make a consent such as this a rule of Court until the ruling of the final schedule; and when some time has elapsed since the consent was entered into the judicial commissioner varies the amount by giving what he considers would now be the value of the sum originally fixed by consent.

Section 16 (sub-s. 3) of the Land Law (Ireland) Act, 1887, provides for the apportionment and redemption of annuities and rentcharges; but the amount could be fixed by the Land Commission only in case the parties so consented. By sect. 20 of the Purchase of Land (Ireland) Act, 1891, this right was preserved. Section 31 (sub-s. 3) of the Land Law (Ireland) Act, 1896, extended the powers of apportionment and redemption to superior interests; but throughout this legislation the right of the parties to agree has been preserved. Redemption is now regulated by the Irish Land Act, 1903, sect. 64 of which provides that, notwithstanding anything in sect. 16 (sub-s. 3) of the Act of 1887, "if the parties do not within the prescribed time agree" upon the redemption price of a superior interest, that price shall be determined by the judicial commissioner or the land judge, as the case may be. The "prescribed time" for the parties to agree is "within one month from the date of the order for redemption":—Rules under the Land Purchase Acts, 2nd July, 1910, Order 8, rule 4. In this case the order for redemption has not been yet made.

[Sir Ignatius J. O'Brien C.: "Within one month" can only mean within a month before or a month after the date of the order for redemption. You do not appear to be within one period or the other.]

Appeal. 1917. *In re* Ponsonby's Estate.

My submission is that "within one month" means at any time not later than one month after the date of the order for redemption.

S. Brown K.C., and *Holmes*, for the respondent, the vendor, were not called upon.

Sir Ignatius J. O'Brien C.:—

The question that has been raised in this Court, though perhaps not quite regularly, by this appeal is a very important one. In consequence of its importance the Court will not refuse on grounds of mere form to entertain it, but desire to determine the question of substance. Shortly before the war broke out this consent was entered into between the parties. By reason of the war this and many other proceedings which were pending in the Land Commission under the Land Purchase Code were held up; and on the one side it is said that this contract having been solemnly entered into by the parties, one of them should not now be allowed to get out of his contract. On the other hand, it has been urged that the enforcement of this contract three years after it was entered into would inflict serious hardship on one of the parties. There is a great deal to be said on the merits on one side and on the other. But, however that may be, the question is one to be decided on the statute and the rules. It is not seriously disputed, and could not be disputed, that in normal conditions two orders are requisite—first, an order for the redemption of the superior interest; and, secondly, an independent order fixing the redemption price. For convenience the practice has been adopted by the Court, on the ruling of the final schedule, of making one order directing redemption, and fixing the redemption price, instead of two orders as formerly. But the technical point has now been raised—that, strictly speaking, two orders are necessary.

Sect. 64 of the Irish Land Act, 1903, provided that "notwithstanding anything in sub-s. 3 of sect. 16 of the Act of 1887, if the parties do not within the prescribed time agree upon the redemption price of a superior interest, that price shall be determined by the Judicial Commissioner or the Land Judge, as

the case may be"; and in pursuance of that section, Order 8, rule 4, fixed the prescribed time as "within one month from the date of the order for redemption." The rule means what it says—viz., a period of time commencing with the date of the order for redemption, and ending one month from that date. If Mr. Leech was correct, it would mean not later than one month after, but at any time before the date of the order for redemption. Sect. 64 gives power to prescribe the time, and the time is prescribed, as I conceive, as within one month after the date of the order for redemption. I express no opinion as to whether the merits are on one side or the other. It is simply a matter of procedure. I do not think there is any necessity to refer to authority for the meaning of the rule, but if there is, the case of *Thomas* v. *Lambert* (1) affords sufficient authority for the construction I adopt. In that case Littledale J. said:—"According to the common construction of the English language 'within a fortnight before Michaelmas' means during the period which elapses in the fortnight immediately before Michaelmas. To say that it means between the time of the expression being used and the commencement of that fortnight would be inconsistent with the common interpretation of words." In this case we must hold that the prescribed time for the parties to agree is within one month after the date of the order for redemption, and that the rule cannot be interpreted as contemplating an agreement at any time before the date of that order.

RONAN L.J.:—

I have reluctantly come to the same conclusion. In this case two parties, entitled absolutely between them to a sum of money, made a definite contract on May 4, 1914, to divide it amongst them in certain proportions. There is no condition in the contract that it should not take effect whenever the money was available. In my opinion, the general intention of the Land Acts in cases such as this of the redemption of head rents, superior interests, &c., is that the parties should be at liberty to agree as to the price. I think also that it was the general intention that the parties were not tied down to what they should agree to; but there was a

(1) 3 Ad. & E. 61.

Appeal. 1917. *In re* PONSONBY'S ESTATE. Ronan L.J.

saving clause that if they could not come to an agreement within a certain time, then the judge was to decide it. I do not think that it was ever intended that an agreement entered into between the parties fixing the price should cease to operate, because a certain formal order was not made at a certain time. But I am not at liberty to give effect to these general views.

The Lord Chancellor referred to the matter in the course of the argument as to whether Mr. Leech might not under this contract have certain rights that might be enforced in another Court. All I say on that point is that I see very great difficulties in his way, but I express no final opinion.

By sect. 64 an absolute duty is cast on Wylie J. to determine the price in this case, if the parties do not within the prescribed time agree on a redemption price. That is a statutory duty; but in determining that price Wylie J. is certainly not bound to disregard an antecedent contract between the parties. In this case, the only agreement made between the parties was one made three years ago, and the question now is whether that agreement was made within the prescribed time. What is the prescribed time? Within one month from the date of the order for redemption. Up to the present there has been no order for redemption. It cannot possibly be suggested, there being no order for redemption, that this agreement was made within the prescribed time. On the other hand, Mr. Leech says that, having regard to the general intention and scope of the Act, "within one month" must be read as a period not later than one month after the order for redemption. If I could find any authority to justify my putting that reading on the words I would do so, but I cannot.

MOLONY L.J.:—

Under sect. 16 of the Land Act of 1887, the duty of the judge in regard to redemption is perfectly clear. It is, in the first instance, to make an order to redeem, and when he has made that order he must ascertain if the parties had agreed to the redemption price. If an agreement had been arrived at he was bound to give effect to it. If not made, the price had to be determined by arbitration if the parties so consented. The question of redemption is dealt with by sect. 20 of the Act of 1881, and sect. 31 (3)

of the Act of 1896, but beyond preserving the rights of the parties to consent they do not help us. Then comes sect. 64 of the Land Act, 1903, which did away with the power of arbitration and puts a time limit to the consent. The parties are to agree within a prescribed time, and the prescribed time had, of course, to be determined by rules made under sect. 50 of the Land Law (Ireland) Act, 1881, and accordingly, rules were made on July 2nd, 1910, and Order 7, rule 4, is the one which affects the present case. That rule necessarily contemplates three distinct matters—(1) the order for redemption; (2) the interval within which the parties must consent if they consent at all; (3) if the consent is not made within the prescribed time the judge may determine the price himself. All we have to decide is whether this consent is within the rule. I am quite clear that it is not, and consequently we cannot accede to Mr. Leech's interesting argument.

Solicitor for the appellant: *Cathcart & Hemphill.*
Solicitors for the respondents: *Sellors & Co.*

C. L.

M. R.
1917.
July 12, 27.

In re NORWOOD AND BLAKE'S CONTRACT.

(1917. No. 597.)

Vendor and Purchaser—Sale of leasehold by administrator—Power of Sale for purpose of distribution among next-of-kin.

An administrator, who has paid the funeral and testamentary expenses and debts of an intestate, has a power of sale over the leasehold property of the intestate for the purpose of distribution among the next-of-kin.

Summons under the Vendor and Purchaser Act, 1874.

This was an application by Robert Otway Norwood, the vendor, for an order declaring that he, as personal representative of John Norwood, deceased, had full power to sell the leasehold premises known as Nos. 1 and 2 Nelson Street, and No. 7 Berkeley Street, in the city of Dublin, and that the objection of John Blake, the purchaser, in respect of the title of the vendor had been sufficiently answered.

The following statement of facts is taken from the judgment of O'Connor M.R.:—

The premises for sale in the present case are held under a lease for 900 years, and were, at the vendor's death, vested in the late John Norwood. He died intestate on the 9th September, 1884, and letters of administration to his estate were granted to Robert Otway Norwood, the vendor, as a next-of-kin, on the 4th May, 1887. Although many years have elapsed since the death of John Norwood, the vendor, as his administrator, was not able until very recently to get into possession of the leasehold interest I have mentioned, and other leasehold interests of the intestate, so as to make them available assets. This is explained by the following circumstances:—The intestate had mortgaged his leasehold estates to the Bank of Ireland, and was subsequently obliged to take the protection of the Court of Bankruptcy. The Bank instituted an action against him to recover the mortgage debt by

a sale of the premises and the appointment of a receiver. That action was subsequently continued against the official and creditors' assignees of the intestate, and the vendor, as his personal representative. The lands were not sold in the action, but the mortgage debt was gradually liquidated by the appropriation of the rents and profits, and it was not until the month of April, 1916, that the suit was finally wound up. The claims of the general creditors of the intestate had also been discharged, and, by an order of the Court of Bankruptcy, dated 28th July, 1916, the official and creditors' assignees of the intestate were given liberty to convey to the vendor the leasehold estates of the deceased, including the premises held under the lease I have mentioned. Subsequently, by conveyance, dated 8th December, 1916, the Bank of Ireland and the official and creditors' assignees joined in conveying the premises to the vendor, as personal representative of John Norwood, deceased. It was thus that the vendor was not able until the end of last year to make the leasehold estates of the deceased available assets for distribution among the next-of-kin.

The next-of-kin are the deceased's widow, entitled to one-third of his personal estate; and six children, including the vendor, each being entitled to one-ninth share. There is one other circumstance in connexion with the title which requires mention. The vendor, by a mortgage dated the 17th June, 1916, mortgaged his interest in the assets as next-of-kin, and, subsequently, by a conveyance, dated 29th January, 1917, conveyed all his interest as next-of-kin to Charles Gamble. This is how the title stood when the property was put up for sale on March 19th, 1917. The sole vendor is Robert Otway Norwood, and he proposed to make good title as the administrator of John Norwood, deceased.

It appeared from the affidavit of the vendor that all the other next-of-kin had called upon him to sell the property of the intestate, and divide the proceeds amongst them and the assignee of his beneficial interest as one of the next-of-kin under the deed of the 29th January, 1917, and that the property was accordingly put up for sale in lots, the premises in question being lot 1. John Blake purchased lot 1 at the auction for £395, subject to conditions of sale, and signed the usual contract; but nothing turned on the conditions of sale.

M. R. 1917.

In re NORWOOD & BLAKE'S CONTRACT.

Herbert Jones, for the vendor:—

The vendor had full power of sale here. The rule of the Statute of Distributions was introduced for the benefit of creditors, and facility of division amongst the next-of-kin. The premises only came into the hands of the vendor in December, 1916. He could not deal with them before. The next-of-kin declined to take them in specie, and called upon the administrator to sell and divide the purchase-money amongst the beneficiaries.

[He referred to *Cooper* v. *Cooper* (1), per Lord Cairns, at p. 65; *Villiers* v. *Holmes* (2); *Tevlin* v. *Gilsenan* (3); *Vanneck* v. *Benham* (4).]

[O'Connor M.R. referred to *Bradley* v. *Flood* (5).]

Newett, for the purchaser:—

The objection to the title is good. The beneficial owner of an undivided share has conveyed away his share to a third party. It is shown by the conveyance of January 29th, 1917, that no debts were remaining unpaid, and the purchaser is not safe in accepting a title from the personal representative. The purchaser cannot know how many next-of-kin there are: there might be only one next-of-kin; and, according to *Tevlin* v. *Gilsenan* (3), the personal representative might be restrained from selling. The conveyance puts the purchaser on inquiry as to the debts, and is inconsistent with a sale by a personal representative: *Cooper* v. *Cooper* (1), per Lord Cairns, at p. 66. The moment the debts and administration expenses are paid the personal representative becomes a trustee for the next-of-kin, and he is bound to assent: *Tevlin* v. *Gilsenan* (3), per Holmes L.J., at p. 533. The facts here are such that the personal representative is bound to assent; he must either admit that he has assented, or that he has committed a breach of trust; he cannot allege his own breach of trust: *Hamill* v. *Murphy* (6). A vendor cannot compel a purchaser to accept another (third) person as vendor: *M'Loughlin & M'Grath's Contract* (7). The test is whether at the date fixed for completion

(1) L. R. 7 H. L. 53.
(2) [1917] 1 I. R. 166.
(3) [1902] 1 I. R. 514.
(4) [1917] 1 Ch. 75.
(5) 16 Ir. Ch. 236.
(6) 12 L. R. Ir. 400.
(7) 48 I. L. T. R. 87.

the vendor was in a position to convey: *Baker & Selmon's Contract* (1); *Halkett* v. *Earl of Dudley* (2); *Farrer* v. *Nash* (3). As to the right of an administrator to sell for purposes of division, he may sell if all the next-of-kin call on him to do so, but the purchaser knows nothing of this; and, if it was so, he must show good title from each of the next-of-kin. The next-of-kin should be set out as vendors in the abstract of title: *Blake* v. *Bain* (4). Lord Macnaghten says at p. 379:—"It is important to note the position of the estate when the deed of indemnity was signed. All the debts had been paid. There was no liability outstanding. The mother's estate was clear. The three sisters were equally entitled to it and every part of it in the actual state and condition in which it was. Without the consent of her two sisters it was neither the duty nor the right of the administratrix to convert the estate into money for the purpose of division or investment."

The purchaser is entitled to evidence as to who the next-of-kin are: *Re Verrell* (5).

Herbert Jones, in reply:—

I rely on the request of the next-of-kin. The vendor assigned his share in his father's estate, not any particular premises: *In re Whistler* (6); *Re Venn & Furze's Contract* (7); Theobald on Wills, 7th ed., p. 448.

Cur. adv. vult.

July 27.

O'CONNOR M.R.:—

This is a case between vendor and purchaser, and it raises an important question which has long been mooted, viz., has an administrator, whose intestate's debts, funeral, and testamentary expenses have been paid, a power of sale over leasehold property of the intestate for the purpose of distribution among the next-of-kin?

[O'CONNOR M.R., having stated the facts of the case, proceeded as follows:—]

The title to sell as administrator is challenged by the purchaser, on the ground that the debts, funeral, and testamentary

(1) [1907] 1 Ch. 238.
(2) [1907] 1 Ch. 590.
(3) 35 Beav. 167.
(4) [1908] A. C. 371.
(5) [1903] 1 Ch. 65.
(6) 35 Ch. D. 561, 565.
(7) [1894] 2 Ch. 101.

M. R. 1917.

In re Norwood & Blake's Contract.

expenses, of the intestate have, as is admitted, been paid, and that his title at most is that of a trustee without power of sale. It is also alleged that his title to sell as administrator has been taken away by the mortgage and assignment of his own share as next of kin.

I will first deal with the case apart from the mortgage and assignment. The general question is, can an administrator, who has duly administered an estate by paying debts, funeral, and testamentary expenses, and has on hands a residue including leaseholds, sell the leaseholds for the purpose of distributing among the next-of-kin?

So far as I know this question has not been closed by any Irish authority. In *Bradley* v. *Flood* (1) there was an elaborate and learned review of the law governing the administration of intestates' estates, but in the judgment I can find no general conclusion other than this, that chattels personal may be distributed in specie, and that it is not necessary in every case that chattels real should be sold with a view to distribution. *Bradley* v. *Flood* (1) was a suit for the administration of the estate of an intestate who died possessed of very considerable personal estate, including leaseholds producing a net rental of over £6,200 per annum. He left surviving his widow and one sister who was sole next-of-kin. Outside the leaseholds there was ample personal estate for payment of debts, funeral, and testamentary expenses. The suit was wound up, and on its completion it appeared that the clear residue consisted of or included the leaseholds. The widow as administratrix of the intestate was the petitioner. She died intestate, pending the suit, and her administrator got a grant of administration de bonis non of the original intestate, and revived the suit. The widow left nine next-of-kin her surviving, but, as was pointed out in the judgment, the estate of the original intestate was for the purposes of the suit divisible only into two equal moieties. In these circumstances, the petitioner, by revivor, who as administrator of the widow (whose next-of-kin amounted to nine persons) found it convenient to have a sale to facilitate distribution among them, applied to the Court for an order that

(1) 16 Ir. Ch. R. 236.

the entire leasehold estates should be sold. The sole next-of-kin of the original intestate, being entitled to a moiety, objected to a sale, and required a conveyance of her moiety. The judgment of the Court was that she was so entitled. My learned predecessor in this Court, Mr. T. B. C. Smith M.R., thought it necessary, before dealing with the Statute of Distributions, to inquire into the law de rationabili parte bonorum as it existed prior to the statute. He entered upon this inquiry, because, as he thought, the Act was passed for the sole purpose of stopping the injustice of the old law, under which an administrator could appropriate to his own use a share of the goods of an intestate, and left untouched the mode of distribution, whether by sale and division of the proceeds, or by appropriation in specie. He thought that there was no intention to alter the law in that respect, and hence he considered it important to see what the then existing law was.

The judgment contains a minute examination of the cases arising out of the writ de rationabili parte bonorum. This was directed to the question whether an administrator before the Act was bound in all cases to sell surplus assets for the purposes of distribution, or whether he might make a distribution in specie. The only conclusion arrived at was that a sale was not necessary before the passing of the Act and was not made necessary by the Act. At p. 263 he says :—"If the result of the authorities before the passing of the Statute of Distributions was that previous to the statute, whether the case was made under the custom or not, the chattels personal might, at least under particular circumstances, be delivered in specie, and the chattels real be distributed in specie, it appears to me that, if such was the law, it would afford great assistance in construing the statute, having regard to the evils to be remedied; and that there is not a word in the statute to show an intention to alter the mode of distribution. It is not alleged that chattels personal and chattels real may not be sold; and perhaps in the majority of cases they ought to be sold. The case of the appellants is, that in every imaginable case they must be sold."

From this it will be gathered that so far from *Bradley* v. *Flood* (1) being an authority that chattels real forming part of

(1) 16 Ir. Ch. R. 236.

M. R. 1917.

In re Norwood & Blake's Contract.

personal estate must be handed over in specie, it is really an authority that it is in the power of an administrator in the exercise of a due discretion to sell chattels real for the purpose of making a distribution among next-of-kin. In *Bradley* v. *Flood*(1) the Court refused an order for sale because it was not merely unnecessary but would be unjust. The chattel real estate was a large one. It was divisible for the purposes of the suit into only two equal shares. The next-of-kin entitled to one moiety objected strongly to a sale and required to be put into possession of it, and the Court, seeing no inconvenience in that, yielded to her objection.

Let me now apply other considerations to the question at issue. I myself for the purposes of the present case can see no distinction between chattels real and pure personal estate; and it does appear to me that if leaseholds must be distributed in specie so must choses in action. But who ever heard it contended that if residuary estate includes a bond or a debenture or a promissory note the administrator should assign or deliver it in specie to several next-of-kin to be held by them in common, and to be recovered by them in an action in which they should all sue for the money due? Or take the case of chattels personal—say live stock—for instance, race-horses of different values—some going into hundreds, perhaps thousands of pounds, while others are only value for £40 or £50 each. Each next-of-kin has an undivided share in each animal. In such a case there cannot be a distribution in specie except by agreement, and is it to be said that there is no power of sale in an administrator, and that he is bound to say to a dozen next-of-kin—some, perhaps, living in immediate proximity to the stock, others living 100 miles away, and others in a foreign country—"My work is done; I have paid the debts, funeral, and testamentary expenses—here is the residuary estate for you—take it; do the best you can with it; fight for it if necessary." The same observations may be made in relation to family plate, pictures, &c.

But there is another consideration which to my mind demonstrates that an administrator must have a power of sale over residuary estate for the mere purpose of equitable distribution.

(1) 16 Ir. Ch. R. 236.

Some of many children of an intestate may have been advanced by him during his life, and the amounts of the advances must be brought into hotchpot. In such case, I know of no way, in the absence of agreement, of ascertaining the proper shares of the next-of-kin except by turning the whole residue into money.

I would, therefore, quite independently of authority and drawing conclusions from legal principles, decide that in a case in which the next-of-kin are numerous and there is no agreement and the leasehold estate is small, the administrator has power to sell and distribute the proceeds.

Let me see now how the authorities other than *Bradley* v. *Flood* (1) stand. I will deal first with the leading case of *Cooper* v. *Cooper* (2). The actual decision was that the next-of-kin of a legatee who was bound to elect for or against the will is in the same position as the legatee, but, for the purpose of that decision, it was necessary to define the estate and interest of next-of-kin in undisposed of personalty. This was done in the clear and unmistakable language of Lord Cairns. He laid it down that next-of-kin have a clear tangible interest in specie in the residuary estate. From this it has been argued by the purchaser in the present case that the next-of-kin of John Norwood are the owners of the estate agreed to be sold, that it is not the property of the administrator, and that the latter has no power to sell. But let me read this passage from the judgment of Lord Cairns at p. 64:—"My Lords, it is very much pressed on your Lordships, in the extremely able argument we heard at the Bar from the counsel for the appellants, that the interest of a next-of-kin in the estate of an intestate is an undefined and intangible interest, that it is a right merely to have the estate converted into money and to receive a payment in money after the debts and expenses are discharged. My Lords, no doubt the right of a next-of-kin is a right which can only be asserted by calling upon the administrator to perform his duty, and the performance of the duty of the administrator may require the conversion of the estate into money for the purpose of paying debts and legacies. But I apprehend that the rule of law, or the rule laid down by the statute, which requires the conversion of an intestate's estate into money, is a rule introduced

(1) 16 Ir. Ch. R. 236. (2) L. R. 7 H L. 53.

M. R. 1917. *In re* NORWOOD & BLAKE'S CONTRACT.

simply for the benefit of creditors and for the facility of division. For the benefit of creditors, and for the facility of division among the next-of-kin, the estate is to be turned into money, but as regards substantial proprietorship the right of the next-of-kin remains clear to every item forming the personal estate of the intestate, subject only to those paramount claims of creditors."

Again, Lord Hatherley shows by an apt illustration the distinct interest of a next-of-kin in the personal estate of an intestate. He takes the case of a sole next-of-kin, and says that he could, by paying the debts, funeral, and testamentary expenses, require that the intestate deceased's property should not be sold, and should be delivered to him in specie. It is therefore established that a next-of-kin has a specific interest in the intestate's estate, but I want to call attention to Lord Cairns's language as to the administrator's power of sale. He has it "for the benefit of creditors, and for the facility of division among the next-of-kin." Mark, it is not merely for the benefit of creditors. It is also for the facility of division among the next-of-kin. So that, although a next-of-kin has a distinct specific interest, there is a paramount power of sale over it. This power of sale does not detract from its specific or substantial or tangible character, because a mortgagor has a specific interest in the mortgagee's property, although there is the over-riding power of sale of the mortgagee. I do not, therefore, think that *Cooper* v. *Cooper* (1) is an authority for the proposition that an administrator has no power of sale over leaseholds in order to distribute the estate among next-of-kin.

Holland v. *Chambers* (2) was also cited. In that case it was decided that a sole next-of-kin who had continued in occupation of a chattel tenancy of an intestate for the qualifying period under the Franchise Acts was entitled to be registered as an inhabitant householder. The tangible and specific nature of his interest, as decided by *Cooper* v. *Cooper* (1), was the basis of the judgments; but I do not think that that touches the paramount right of sale, which in a proper case is vested in an administrator. *Tevlin* v. *Gilsenan* (3) was the case of a judgment mortgage registered against the estate of a next-of-kin in a chattel interest in lands. The question was whether the next-of-kin had such an

(1) L. R. 7 H. L. 53. (2) [1894] 2 I. R. 285. (3) [1902] 1 I. R. 514.

estate as came within the Judgment Mortgage Act. It was decided that he had such an estate; that he had a distinct tangible thing in specie on the principle laid down in *Cooper* v. *Cooper* (1). But again I say this is not inconsistent with a paramount right of sale over the specific property. *Blake* v. *Bayne* (2) is no authority against this view, because there the next-of-kin, three in number, had agreed to take the residuary estate in specie rather than have a sale thereof. The right of the administrator to sell for the purpose of distribution was for that reason not exercisable.

On the other hand, *Lord Sudeley* v. *The Attorney-General* (3) is clear authority for the proposition that residuary legatees (who for the present purpose stand in the position of next-of-kin) have not the right, independently of agreement between all of them, to claim residuary estate in specie. It is not necessary to go into the particular facts of that case. It is sufficient to say that the question was whether the testator's widow, one of several residuary legatees, was entitled to claim in specie a share of certain mortgages which formed part of the testator's residuary estate. It was held by the House of Lords that she was not, but only entitled to call upon the executors to administer the estate, to realize it, and pay her a share of the proceeds. No doubt, in that case the residuary estate had not been finally ascertained, because all the debts and legacies had not been paid, and so far it is not like the present case; but the judgment of Kay L.J., which was adopted by both Lord Halsbury and Lord Macnaghten, decides that even an ascertained residue must be converted in the absence of agreement. I will quote one passage from the judgment of Kay L.J. (4):—"The executors of Frances (the residuary legatee who had died) could not compel Algernon's (the testator's) executors to transfer to them any of the New Zealand mortgages (part of the residuary estate) in respect of her one-fourth share of residue. That could only be done if these mortgages happened to remain unconverted when all debts and legacies were paid, and the residue became divisible, and all the residuary legatees agreed that the mortgages should remain unconverted." Here we have

(1) L. R. 7 H. L. 53.
(2) [1908] A. C. 371.
(3) [1897] A. C. 11.
(4) [1896] 1 Q. B. 365.

M. R. 1917.

In re Norwood & Blake's Contract.

it on the authority of Kay L.J., in a judgment adopted by the House of Lords, that even in the case of an ascertained residue there must be conversion unless all the residuary legatees agree to take in specie. Lord Shand, in the House of Lords (1), is equally clear on the point. He says:—"It is quite clear that the New Zealand mortgages were the property of Mr. Tollemache when he died, and I have seen nothing that occurred after that to make these mortgages the property of his widow. There was no allocation of any kind; and the trust fund was not in a position to be wound up. Even although the legacies and debts had all been paid I should hold the same view. There were a number of persons having right to the residue, and interested in its realization. The claim of Mrs. Tollemache's executors and trustees was really a claim to a share of the residue, and it had never been changed by allocation either by Mrs. Tollemache's trustees, or by arrangement with the other persons interested, so as to make the right of these executors a right to specific assets." There is, therefore, the highest authority for holding that an administrator has a right to realize for the purposes of distribution as well as for paying debts, funeral, and testamentary expenses.

It has been sought to weaken the authority of *Lord Sudeley* v. *The Attorney-General* (1) by the circumstance that *Cooper* v. *Cooper* (2) was not cited; but as both were decisions of the House of Lords, both must stand, and there was really no conflict between them. This has been shown by Younger J. in *Vanneck* v. *Benham* (3). He there says:—"But I think that it is not difficult to arrive at the true distinction between the two lines of authority, which, at first sight, may seem to be in conflict. The distinction, it appears to me, is that an interest in an intestate's estate is sufficiently specific to raise a case of election, representing, as that interest does, all the money's worth of the property comprised therein, but that such interest is not sufficiently specific, apart from agreement with the next-of-kin where there are more than one, to enable any one of the next-of-kin to say to the administrator—"This is what is mine: hand it over to me."

(1) [1897] A. C. 20. (2) L. R. 7 H. L. 53.
(3) [1917] 1 Ch. 60, 76.

I will conclude this part of the case by adopting the happy language of Barton J. in *Villiers* v. *Holmes* (1):—"The interest of a next-of-kin in the unadministered estate of an intestate is a specific interest sub modo. It is sufficiently specific for some purposes: e.g., to be capable of being assigned, or of being mortgaged, or of being made the subject of a binding agreement, or to raise a case of election. But it is not sufficiently specific for all purposes." In my judgment it is not sufficiently specific to prevent an administrator from realizing chattels real for the purposes of making a proper distribution. In the present case the residuary estate is divisible into a one-third share and six one-ninth shares. The estate is not a large one. It is said that the next-of-kin are scattered—some abroad. It is manifest that not merely the most convenient but the most equitable mode of distribution is to sell and divide the proceeds. The alternative would be to give the unfortunate legatees the right to a sale under the Partition Acts in a suit instituted for that purpose.

The only remaining question is, whether the assignment by the administrator of his share as a next-of-kin affects his right to sell in his representative capacity. Surely it does not, because that would deprive the other next-of-kin of their right to a proper distribution.

Solicitors for the vendor: *Hamilton & Craig.*
Solicitor for the purchaser: *W. J. Shannon.*

W. L.

(1) [1917] 1 I R. 167.

Appeal.
1917.
July 25.

ALLEN *v.* MURPHY (1).

Vendor and purchaser—Title—Lease—Renewal—Lapse of time—Validity.

A lease contained a covenant for renewal every thirty years during a period of 999 years, no time being fixed within which the lease was to be renewed. In 1913, nineteen years after the expiration of the previous lease, a tenant for life of the premises granted a renewal to the lessee, who had remained in possession, paid the rent, and observed the conditions of the lease. On the sale of the lessee's interest the purchaser challenged the validity of the renewal on the ground that it was out of time.

Held, that the mere lapse of time did not render the renewal inoperative, and that, except in a case where time was of the essence of the contract, no distinction could be drawn between the powers of an absolute owner and those of a limited owner to grant a renewal.

SUMMONS.

This was an appeal by the purchaser, William M. Murphy, from an order of Mr. Justice Barton, whereby it was held that a renewal, dated March 14th, 1913, of the lease of the premises in question was not invalid as being out of time, and that the objections of the purchaser to the title to the hereditaments comprised in the contract had been sufficiently answered by the vendor.

By a contract, dated May 14th, 1917, Henry John Allen agreed to sell, and Mr. Murphy agreed to buy, the leasehold premises known as 28 Lower Sackville Street and 4 Earl Place, in the City of Dublin, for the sum of £10,000. The original lease, dated June 24th, 1805, was for a term of twenty-nine years from September 29th of that year, and contained a covenant for renewal at the end of every thirty years thereafter during a period of 999 years computed from March 25th, 1754. Renewals were granted in 1834 and 1866. The term of thirty years granted in 1866 ran from 1864 and expired in 1894. In 1905 Mrs. Florence M'Keague, under the will of the late owner, became tenant for life and trustee of the lessor's estate, and on March 14th, 1913, she granted to Henry John Allen, the vendor in this case, a lease for sixty years from September 29th, 1894, in lieu of a lease for

(1) Before SIR IGNATIUS J. O'BRIEN C., and RONAN and MOLONY L.JJ.

a further term of thirty years from 1894. The validity of this renewal was challenged by the purchaser on the grounds that it was out of time, and that the lessor as trustee and equitable tenant for life could not bind the persons beneficially entitled in remainder.

H. Wilson K.C. and *Poole*, for the appellant:—

We submit that under the covenant the lessee in this case, if he wanted a renewal, might have applied before the expiration of the term; that if he omitted to take that course he was certainly bound to apply within a reasonable time after the expiration of the lease of 1866; and that as more than a reasonable time was allowed to elapse, the renewal of 1913 is not valid.

On the ground that he was bound by the decision of the Vice-Chancellor in *M'Dermott* v. *Caldwell* (1), Mr. Justice Barton held that the purchaser's requisitions had been sufficiently answered. In view of the decision in *Hussey* v. *Domville* (2), the case of *M'Dermott* v. *Caldwell* (1) cannot be regarded as an authority in support of the renewal here. In *Hussey* v. *Domville* (2), Walker L.J., at page 444, says: "In my opinion there is no authority for the proposition that the Tenantry Act can be resorted to for the purpose of supplying any argument, either directly or by analogy, in support of the enforcement of a covenant for limited renewal such as exists in the present case. The case of *M'Dermott* v. *Caldwell* (1) may be subject to different considerations from the present, and I express no opinion on it." We rely strongly upon the following passage in the judgment of Madden J. in *Domville* v. *Callwell* (3):—"In the present lease, no specific time having been limited within which the nomination is to be made, the lessee is entitled to exercise his right within a reasonable time after the dropping of each life." Where premises were let for three years with the option of renewal, and the lease did not set out the period within which the option was to be exercised, it was held by Bruce J. that the application for renewal had to be made within a reasonable time before the expiration of the original lease: *Lewis* v. *Stephenson* (4).

M'Cann K.C. and *Leet*, for the respondent, were not called upon.

(1) I. R. 10 Eq. 504.
(2) [1900] 1 I. R. 417, 428.
(3) [1907] 2 I. R. 617, at p. 640.
(4) 67 L. J. Q. B. 296, at p. 300.

Appeal. 1917.

ALLEN v. MURPHY.

SIR IGNATIUS J. O'BRIEN C.:—

Both from the point of view of the purchaser and that of the profession the question involved in this case is of some importance.

It appears that at the time, namely, March 14th, 1913, the last document to be treated as a renewal was executed, the lessor was not absolute owner of the reversion expectant on the determination of the lease for 999 years, but was only tenant for life, her children being apparently the persons entitled in remainder. She continued, notwithstanding the expiration of the renewal of 1866, to receive the rents, and after the term of thirty years had come to an end nineteen years were allowed to elapse before any document which could be construed as a renewal came into existence. It is admitted that Florence M'Keague, as tenant for life, was entitled to grant a renewal; but the purchaser takes up the position that the document of 1913 cannot operate as a valid renewal so as to bind the lessor. He states his objection in the first set of requisitions as follows:—"The right to call for a renewal of the lease of 1805 of the premises in Earl Place should have been exercised before the expiration of the term of twenty-nine years, and all the renewals were out of time. The purchaser waives objection in respect of the renewal of 20th August, 1834, but he requires to be satisfied that Florence M'Keague, the lessor in the renewal of 1913, was at that date absolutely entitled to the reversion free from all incumbrances." The answer of the vendor was:—"See statement herewith obtained by vendor when obtaining the last renewal of 1913. The covenant is to renew at the end of every thirty years until the expiration of 999 years. Time is not stated to be of the essence of the contract." In the second set of requisitions the purchaser said:—"The statement shows that the lessor in the renewal was a trustee and equitable tenant for life, and could not bind the persons beneficially entitled in remainder. As to the time for applying for renewal, see *Lewis* v. *Stephenson* (1). A deed confirming the renewal should be executed by the persons entitled in remainder, and searches against them will be necessary." The vendor replied:—"The option to renew in *Lewis* v. *Stephenson* (1) is clearly distinguishable from the

(1) 67 L. J. Q. B. 296.

covenant in the present case. The renewal of 1913 was not out of time, and the vendor will not obtain any such deed of confirmation." On that answer the issue has been knit.

The purchaser is a willing purchaser, and the only question he raises is one of pure law. It may be well before coming to the Irish authorities, to deal with the case of *Lewis* v. *Stephenson* (1). In that case the lessee, who was held to have the right to a second lease for three years, made his application for renewal before the expiration of the first term of three years. Bruce J., in his judgment, says:—"As to the period within which the option is to be exercised when nothing is specified, I think I am doing no violence to the ordinary canon of construction when I say I think that must be taken to mean within a reasonable time before the expiration of the original lease; and as, in the present case, the defendant applied for a renewal in the month of March, and the original tenancy did not expire until June 24th, I think that the application for renewal was in time." That case proceeded on the hypothesis that the application for the renewal should have been made before the expiration of the first term of three years. But if the case is an authority for the proposition that where no time is specified, the application for renewal must be made before the expiration of the lease, I dissent from that general proposition. If the application in that case had to be made before the expiration of the lease, time might be regarded as of the essence of the contract, and the decision might fall within the cases in the Court of Appeal in this country; but clearly the lessee was not bound to apply for renewal before the expiration of the lease. Once that decision disappears as inapplicable, this case becomes very simple.

Mr. Poole's argument has been that the lapse of nineteen years after the expiration of the lease was an unreasonable time, and that in the circumstances the document of 1913 purporting to be a renewal, although it may have some operative effect during the lifetime of the grantor, could have no operation against the remainderman. Let us take the case where there is not a limited but an absolute owner. The only person who has any real interest in getting a renewal, where there is no renewal fine, is

(1) 67 L. J. Q. B. 296.

Appeal. 1917. ALLEN v. MURPHY. Sir Ignatius J. O'Brien C.

the tenant. The landlord continues to receive the rents. If a renewal is made ten, twenty, thirty, or forty years after the expiration of the lease, is it to be presumed that it is not effective? If title in all such cases was to be challenged, the only practical result would be that in every case where renewal was taken out after the expiration of the lease, there would have to be a Chancery suit to determine whether an unreasonable period had elapsed; and the document might be inoperative whether the period was twelve years or twelve months.

It has been suggested that the vendor in this case was estopped from obtaining a renewal. In Fry, on Specific Performance, 5th ed., p. 541, par. 1105, this matter is dealt with thus: "But where no time has been originally limited within which a tenant's option to have a lease must be exercised, and the landlord has never called upon the tenant to declare his option, mere lapse of time will not preclude the tenant or his assign or legal personal representative from exercising it." That is the ordinary law with regard to the simple case of an option for a lease; but where the option is given by a contract of a peculiar character such as that contained in the document of 1805, and after the expiration of the term the owner grants a renewal under the original contract, I do not see how any question as to its validity can arise. If that be the law as I conceive it to be, in the case of an absolute owner, I fail to discover that it can be different in the case of a renewal granted by a limited owner, apart from time being of the essence of the contract.

It is admitted that a limited owner has power to grant a renewal within a reasonable time; but it has been argued that reasonable time should be treated as if time was of the essence of the contract. This argument is self-contradictory. If a particular time is of the essence of the contract, the point as to a reasonable time does not arise, and if only the question of reasonable time is to be considered, time as of the essence of the contract is altogether out of the case. I am deciding this case on the ordinary principles of a court of equity applicable to cases where time is not of the essence of the contract, and also having regard to the principles of equity in specific performance suits where an option to receive a lease is given.

Mr. Justice Barton said this case was ruled by *M'Dermott* v. *Caldwell* (1), and that was a convenient way for him to deal with the question. I am not ruling whether that case was rightly or wrongly decided. It could, indeed, be supported without reference to the Tenantry Act at all. I think the comment of Walker L.J. on that case in *Hussey* v. *Domville* (2), at p. 444, is well founded. He says: "In my opinion there is no authority for the position that the Tenantry Act can be resorted to for the purpose of supplying any argument, either directly or by analogy, in support of the enforcement of a covenant for limited renewal, such as exists in the present case. The case of *M'Dermott* v. *Caldwell* (1) may be subject to different considerations from the present, and I express no opinion on it." In *Hussey* v. *Domville* (2) the Court of Appeal held that time was of the essence of the contract, and that there was no equity to relieve the lessee from his own neglect. In that case there was a specified time, namely, six months from the death of the cestui que vie, within which the lessee had to nominate a new life. Therefore, the case came within the general proposition stated in Furlong, and cited by FitzGibbon L.J. in his judgment. In Furlong's Law of Landlord and Tenant, 2nd ed., vol. 1, book 2, c. 4, sect. 35, p. 289, it is stated that: "If a lease merely contains a covenant for one or more renewals, or to renew from time to time, during a limited period, it is incumbent on the tenant to observe with strictness the terms of the covenant, as a court of equity will not relieve against the legal consequences of his negligence, unless a strict performance be prevented by the default or misconduct of the landlord, or by ignorance not wilful, or by unavoidable accident." All the authorities cited in support of that proposition are cases where a specified time was fixed for applying for the lease, and where time was of the essence of the contract.

Whether or not *Hussey* v. *Domville* (2) overruled *M'Dermott* v. *Caldwell* (1) does not affect the present case. For the reasons given I am of opinion, although my conclusion is based on different grounds, that the decision of Mr. Justice Barton was correct.

(1) I. R. 10 Eq. 504.

(2) [1900] 1 I. R. 417.

Appeal. 1917. ALLEN v. MURPHY. Ronan L.J.

RONAN L.J. :—

I concur. As to *Lewis* v. *Stephenson* (1) I would quote the statement in reference to that case in Foa's Landlord and Tenant, 5th edition, page 307, viz. :—"Where the lease is silent as to the time when application for renewal should be made it has been said that it must be made a reasonable time before its expiration. But it is not, as it is thought, to be inferred that the lessee will lose his right of renewal altogether by not having made it, if he continue in possession afterwards with the sanction of the lessor."

There is a very material difference between this case and *Hussey* v. *Domville* (2). In the latter case there was a right of renewal during a period of ninety years; in the present case there is a right of renewal during 999 years—a period regarded by most people as a perpetuity. In this case there is no time specified within which the tenant is to apply for a renewal; in *Hussey* v. *Domville* (2) there was a covenant to renew if the lessee applied within six months from the death of the cestui que vie. In his judgment FitzGibbon L.J., at page 451, says:—"The essential difference between our view of this case and that taken by the Vice-Chancellor is that he regarded the question as being 'Whether mere neglect to nominate new lives within the prescribed period is sufficient to disentitle him to the relief which the Court, on its general principles, affords in case of forfeiture.' We, on the contrary, hold the action to be in its nature a suit for specific performance of the covenant for renewal contained in the lease of the 1st August, 1823, and the plaintiffs must show that, at law or in equity, they are entitled to enforce that covenant." He proceeds to state the terms of the contract, and then deals with the argument based on the Tenantry Act, pointing out that that statute did not apply in terms because it gave relief only to "tenants holding under leases for lives containing covenants for perpetual renewal," while the lease in question was renewable only for lives nominated during a term of seventy years.

In *M'Dermott* v. *Caldwell* (3) the covenant was practically the same as in this case, and no time was mentioned within which application should be made for a renewal. The Vice-Chancellor, at page 509, says:—"I can see no difference between the case of

(1) 67 L. J. Q. B. 296. (2) [1900] 1 I. R. 417, 428. (3) I. R. 10 Eq. 504.

a lease renewable for ever without a fine, and that of a lease renewable for a thousand years. But it has been contended that there has been such laches as disentitles the plaintiffs to a renewal. There was no notice served on them calling on them to renew; there was no malfeasance on their part; there was no withholding of renewal fines; possession has continued as before; the same rent has been paid and received, and everything has gone on as if the last renewal was still unexpired. This being therefore a case of mere nonfeasance, I cannot hold that there was anything to disentitle the plaintiffs to a renewal." Mr. Justice Barton was right in following the decision in *M'Dermott* v. *Caldwell* (1); but it is unnecessary for us to add anything to the observations made by Walker L.J. and FitzGibbon L.J. in *Hussey* v. *Domville* (2) upon that case.

Where there is the exercise of a power of renewal by a tenant for life; where no time is fixed by the lease for applying for the renewal; where no notice has been served by the landlord calling upon the tenant to elect whether he will ask for a renewal or not, and where everything has gone on as if a renewal had been taken out, the reasonable presumption is that the parties had agreed to let the technicality of renewal lie over, and that neither party had any intention of raising any question as to the forfeiture of the tenant's rights.

MOLONY L.J.:—

I agree. There is no time fixed within which the lease is to be renewed, and we are asked to say that the lease of 14th March, 1913, was inoperative because it was not obtained until nineteen years after the expiration of the previous lease, notwithstanding that the lessee remained in possession, paid the rent, observed the conditions, and was never asked or required to accept a renewal.

It is admitted that Florence M'Keague, as tenant for life, was entitled to grant a renewal, but that such right could only be exercised by her either (*a*) before the expiration of the lease of 1866, or (*b*) within a reasonable time after the expiration of that lease.

(1) I. R. 10 Eq 504. (2) [1900] 1 I. R., at pp. 444, 454.

Appeal.
1917.
ALLEN
v.
MURPHY.
Molony L.J.

As regards (*a*), the case of *Lewis* v. *Stephenson* (1) has been relied on. In that case Bruce J. said, although it was no way necessary for the decision, that the application should be made before the expiration of the lease; but if he meant to say that the renewal could not be applied for afterwards, I cannot accept his view. As regards (*b*), it is clear that in the present case we have no time limit, no renewal fine, and nothing to cause any loss to the landlord by reason of the delay. The lessor did not herself consider nineteen years an unreasonable time or she would not have granted the renewal in 1913. Had she thought that the lease should have been renewed earlier, it would have been easy for her to serve a notice requiring the lessee to take out a renewal within a limited period. If the lessor in 1913 had been an absolute owner, the case would be unarguable, but I am unable to see that there is any material difference, in the circumstances of the present case, by reason of the lessor being only tenant for life.

I do not think it necessary to go into the facts of *M'Dermott* v. *Caldwell* (2) further than to say that I think the decision in that case was right, and can be supported without in any way relying on the equity of the Tenantry Act (19 & 20 Geo. 3, c. 30).

I think that the requisition was sufficiently answered, and that the ruling of Mr. Justice Barton was right, and ought to be affirmed.

Solicitors for the appellant: *E. & G. Stapleton.*
Solicitors for the respondents: *A. & L. Goodbody.*

C. L.

(1) 67 L. J. Q. B. 296.

(2) I. R. 10 Eq. 504.

O'MEAGHER *v.* DALY.

Appeal.
1917.
Nov. 12, 13.

Mortgage Suit—Costs of puisne incumbrancer—Priority—Special circumstances.

The plaintiff, who was seventh in priority as an incumbrancer on lands of the defendant, instituted an action to raise the amount of his charge, and obtained a primary decree for sale. The lands were held under a tenancy from year to year, and notice of intention to sell having been served upon the landlord, the latter exercised his right of pre-emption, and offered £200 as the pre-emption price. The true value of the lands was subsequently ascertained by the Court of the Irish Land Commission to be £500, the Land Commission proceedings having been carried through by the plaintiff without any order in the suit directing him to do so. The sum of £500 was only sufficient to discharge the first five incumbrances, and portion of the sixth, no part of the plaintiff's demand being reached. The owner of the sixth incumbrance had proved his claim thereto, but otherwise took no part in the suit.

Held, by the Court of Appeal (affirming the judgment of Barton J.), that the plaintiff was only entitled to be paid his costs in the same priority as his incumbrance, and that no special circumstances existed entitling the plaintiff to priority in payment of his costs.

Per Ronan L.J.:—In such a case the Court will not enter upon an inquiry as to whether the puisne incumbrancer had a reasonable expectation of being paid when he commenced his proceedings.

This was an appeal against the order of Barton J., dated the 25th April, 1917 (reported supra, p. 341, where the facts are stated), by which he refused the plaintiff's application to be paid his costs of the suit as mortgagee's costs in priority to the incumbrances affecting the lands.

S. L. Brown K.C. and *Devitt*, for the appellant:—

The appellant is entitled to his costs of action out of the moneys realized by the suit, and not merely with his demand. It it is necessary for him to establish special circumstances, he has done so. He obtained the appointment of a receiver, who kept down the head-rent for the benefit of all the incumbrancers. He produced the fund out of which the prior incumbrancers were paid, and the respondent took advantage of this, he having attended at Chambers, and proved his claim. As he took the

Appeal. 1917. O'MEAGHER v. DALY.

advantage of the suit, he cannot complain if appellant's costs are paid in priority to his own claim: *White* v. *The Bishop of Peterborough* (1); *Kenebel* v. *Scrafton* (2); *Ford* v. *The Earl of Chesterfield* (3); *Wright* v. *Kirby* (4); *Batten, Proffitt, and Scott* v. *Dartmouth Harbour Commissioners* (5). The appellant, by contesting the matter of the pre-emption price, procured an increase of £300 beyond what was offered by the landlord, and at least the costs of the Land Commission proceedings should be allowed in priority: *Cope* v. *Breslin* (6). In *Carrick* v. *Wigan Tramway Co.* (7), a debenture-holder's action, Chitty J. held that the plaintiff was entitled to the costs of the action other than such as had been incurred by him in support of his own security only. The respondent, who knew all about the suit, and took advantage of it, is as much bound by the proceedings as if he were a party to it, or a notice party: Chancery (Ir.) Act, 1867, sect. 66, rr. 7 and 9, Order 33, r. 7. The appellant could have proceeded by petition in the Land Judge's Court; and if he had done so, his reasonable expectation of having his demand met would be one of the circumstances to be taken into consideration in giving him his costs: *In re Hutchins* (8); Madden's Land Judge's Practice, 3rd ed., pp. 97, 98. The appellant should not be in a worse position by reason of his having proceeded by action. The figures show that the appellant had such reasonable expectation. The interest due, as shown by the Chief Clerk's certificate, accrued subsequent to institution of the proceedings, and apart from this interest the appellant would have been reached.

[Ronan L.J.: Lord Plunket in *Peyton* v. *M'Dermott* (9) stated that the Court would not enter upon an inquiry as to "the probable or possible expectations of the parties with regard to the produce of the fund."]

The practice in this respect has been changed since Lord Plunket's time. If the rule as to costs be as suggested, it inflicts an injustice on puisne incumbrancers, whose hands will remain tied so long as prior incumbrancers are satisfied to take no steps.

(1) Jac. 402.
(2) 13 Ves. 370.
(3) 21 Beav. 426.
(4) 23 Beav. 463.
(5) 45 Ch. D. 612.
(6) [1901] 1 I. R. 466.
(7) [1893] W. N. 98.
(8) 11 I. J. N. S. 400.
(9) 1 Dr. & Walsh, 198, at p. 234.

H. D. Conner K.C. and *Poole*, for the respondent:—

The appellant is only entitled to his costs in the same priority as that in which his incumbrance is payable. Although this rule varied in early times in Ireland, it has long since been well settled. *Handcock* v. *Handcock* (1); *Peyton* v. *M'Dermott* (2); *Nelson* v. *Brady* (3); *Hilliard* v. *Moriarty* (4); *M'Spadden* v. *Patterson* (5). No special circumstances are shown to exclude the operation of the rule. Everything the appellant did, including the appointment of a receiver, and the steps he took in contesting the amount of the pre-emption price, he did for his own benefit: *In re Marine Mansions Co.* (6). No doubt the respondent came in and proved his claim to his incumbrance, but he did nothing more. He was not a notice party, and he did not even attend in Chambers. In every case there is an inquiry as to incumbrances, and the priorities are determined. If the mere proving of the claim amounts to a special circumstance in appellant's favour, the rule is abrogated. As to the suggested practice in the Land Judge's Court of considering whether the puisne incumbrancer presents his petition with a reasonable expectation of being paid, section 78 of the Landed Estates Court (Ir.) Act, 1858, clearly contemplates that the costs of such an incumbrancer shall rank only in the same order of priority as his incumbrance. We rely on *Peyton* v. *M'Dermott* (2) as showing that such an inquiry should not be entered upon. In any case the figures here show that the appellant can have had no such reasonable expectation.

THE LORD CHANCELLOR:—

I am of opinion that the order of Barton J. in this case was right. Several topics have been discussed in the argument before us, which unquestionably were not before him, and which I must refer to. The action was brought by the plaintiff, a puisne incumbrancer, praying for a sale of the mortgaged lands. It is important, having regard to one of the matters discussed before us, to observe that, as the suit is framed, it bears no resemblance to a proceeding brought for the benefit as well of others as of the

(1) 1 I. Ch. R. 444.
(2) 1 Dr. & Walsh, 198.
(3) 4 I. E. R. 359.
(4) [1894] 1 I. R. 316.
(5) 39 I. L. T. R. 122.
(6) L. R. 4 Eq. 601.

Appeal. 1917. O'MEAGHER v. DALY. Sir Ignatius J. O'Brien C.

plaintiff himself. Under the general Order, at all events according to the view of the late Master of the Rolls, a puisne incumbrancer may be brought in in such a suit and bound in the same way as notice parties may be bound in an administration suit; but in the present suit it appears clearly that Mr. Solomon, the prior incumbrancer who is sought to be affected by this application, was never served with any notice making him a party to the suit, and his first appearance in the suit was when he came in to prove his claim in Chambers, which he did, and which entitled him to be paid in his proper priority, if he was reached, the amount of his claim and costs. Having done that, he disappears from the suit, except in so far as he must be dealt with when the final allocation of the funds is brought about. The present suit is then a very different proceeding from one in which Mr. Solomon might have been an actual party to the suit, assuming that his being an actual party could affect the question we are discussing. I think it is clear that the act of the superior incumbrancer in coming in to prove his claim in no way operates by way of estoppel against him, or renders the suit one with which he becomes so intimately connected that he must be affected by the costs which may be incurred by the puisne incumbrancer in bringing the fund into existence. Even where the owner of a charge took advantage of administration proceedings to realize the charge, as in *M'Spadden* v. *Paterson* (1), this Court has held that the costs of the administration proceedings did not take priority over the capital value of the charge and the chargeant's costs of suit. The same principle is recognized in *Hilliard* v. *Moriarty* (2). It is to my mind a novel proposition that a superior incumbrancer who comes in to prove his charge in a suit brought by a puisne incumbrancer, renders the suit his own, so as to have his charge postponed to the puisne incumbrancer's costs of the suit, and more especially where it is either a matter of indifference to the superior incumbrancer whether there is an enforced sale or not, or is a matter of preference to him that there should not be an enforced sale, owing to the fact of his being in receipt, as here, of a high rate of interest, and to the risk involved, when the interest charged is a yearly tenancy liable to be pre-empted by the land-

(1) 39 I. L. T. R. 122.

(2) [1894] 1 I. R. 316.

lord, of a lesser sum being produced than would be the case if there could be a sale in the open market. It is argued, however, that there is a rule of law by which we are bound to hold that these proceedings are in some way to be taken as instituted by the puisne incumbrancer for the benefit of all, and that therefore all must bear a proportion of the expenditure which has been incurred by the puisne incumbrancer. I am unable to discover the existence of such a rule. Indeed, I think that *Hilliard* v. *Moriarty* (1) (although the suit there was an administration suit, and the case is not therefore on all fours with the present) does show what the general rule of law is in this country, namely, that an incumbrancer is entitled to be paid in full the amount of his incumbrance, and that he cannot be compelled to have that amount lessened by reason of the costs incurred in the course of any proceedings in which he gets paid his demand. To go further back in the history of our law, I may mention the three cases which Lord Justice Ronan referred to in the course of the argument: *Handcock* v. *Handcock* (2); *Peyton* v. *M'Dermott* (3); and *Nelson* v. *Brady* (4). It would be mere affectation on my part to do anything more than shortly paraphrase the rule laid down in such simple terms and so clearly in these cases. It appears, as stated by Lord Plunket in *Peyton* v. *M'Dermott* (3), that the rule had at one time been varied, that adopted by Lord Manners having been altered by Sir Anthony Hart; but ultimately the rule became stereotyped, and remained so down to the passing of the Landed Estates Court Act of 1858. It is this—that a puisne incumbrancer cannot by bringing an action to realize his mortgage or charge compel an incumbrancer who is higher in order to have the amount of his incumbrance lessened by reason of the costs incurred in the proceedings. *Nelson* v. *Brady* (4) may appear at first sight to afford an exception to the rule, but, when carefully considered, it does not, and, on the other hand, we find the rule there laid down by Sir E. Sugden in the clearest terms. Two suits were there in question—one by a daughter of a deceased man to raise a charge, and a second by a judgment creditor of the deceased, whose demand was puisne to the charge.

(1) [1894] 1 I. R. 316.
(2) 1 I. Ch. R. 444.
(3) 1 Dr. & Walsh, 198.
(4) 4 I. E. R. 359.

Appeal. 1917. O'MEAGHER v. DALY. Sir Ignatius J. O'Brien C.

The proceedings were not consolidated, but what was equivalent at that time to consolidation took place, and the proceedings became ultimately one in which both parties, the puisne incumbrancer and the prior incumbrancer, were together utilizing the process of the Court to realize the estate, with the result that the charge alone was reached. Sir Edward Sugden, as I have said, recognized the existence of the rule, and applied it by refusing the claimant who was not reached his costs of suit, but he allowed him the costs of the work done, the benefit of which was derived by the prior chargeant, "because," as Sir Edward Sugden said, "it was doing for the defendant what she would otherwise have been obliged to do for herself." That is not an exception to the rule. In *Taylor* v. *Gorman* (1) the rule was applied in a manner where its apparent harshness seems striking, because if it had not been for the exceptional ability and energy with which the solicitor for the puisne incumbrancer had carried out the proceedings nothing would have been recovered by anyone. Lord Plunket, however, held that the plaintiff was only entitled to his costs with his demand, and said, "I cannot depart from the ordinary rule of the Court." At that time the only way in which estates could be sold was by the cumbersome procedure then adopted in Chancery, now replaced by our cheap and expeditious procedure. The Incumbered Estates Court Act was then introduced with the hope, which proved nugatory, of bringing about a state of Elysium by compelling the sale of all incumbered estates in Ireland. In lieu of Chancery proceedings, a procedure was introduced before special commissioners—now Chancery Judges—for the compulsory realization by sale of the property of mortgagors, a statutory title being given. The 78th section of the Landed Estates Court Act appears to be a statutory recognition of the existence of the rule, and shows clearly that it was intended to be applied in the case of a puisne incumbrancer exercising the right given to him under the Act of forceably realizing the whole property. The puisne incumbrancer must set out in his petition the names of all persons interested in the lands; the sale enures for the benefit of all, yet, "unless the judge shall otherwise direct," the costs of the petitioner are payable out of the proceeds of the sale only "in the same order of

(1) 1 Dr. & Walsh, 235 *n.*

priority in which the incumbrance of the petitioner shall be payable." It is suggested that this rule has been abrogated in some way, but the contrary appears to me to be the fact. In the case of *Northern Banking Co.* v. *Sloan* (1), Porter M.R. recognized the existence of the rule, although he appears to have taken into consideration whether there were any special circumstances which would entitle him to disregard it. That case does not help the appellant, and I repeat that in *Hilliard* v. *Moriarty* (2) also the rule was clearly recognized as being the ordinary rule of our procedure.

Appeal. 1917. O'MEAGHER v. DALY. Sir Ignatius J. O'Brien C.

No authority has been cited in which a change in this rule has been suggested. Accordingly, the conclusion arrived at by [illegible] J., was, in my judgment, correct. No argument was addressed to him based on the supposed existence of special circumstances which would entitle the appellant to his costs in priority to the respondent's claim; but as such an argument has been advanced here, I must deal with it. It was said, in the first place, that as the plaintiff resorted to proceedings in Chancery instead of proceeding by a petition for sale in the Land Judge's Court, we ought at any rate to consider, according to the supposed rule or custom in the Land Judge's Court, whether at the time of the institution of his suit there was a reasonable chance of his charge being met; and if there was such a reasonable chance, he should get his costs out of their ordinary priority. I mentioned during the argument that this lenient treatment of puisne incumbrancers as regards their costs of sale had its origin at a time when hardship was frequently brought about by lands being sold at a totally inadequate price. The section of the statute, however, remains unaltered, and even if this were a case in which we could apply the supposed practice of the Land Judge's Court, the facts of the case must not be lost sight of. The plaintiff must have taken into account that the lands which were subject to his charge were held merely as a tenancy from year to year, and subject to the landlord's right of pre-emption—a right which if exercised would result inevitably in a lesser price being obtained than the full market value of the lands. Accordingly, the fact that he

(1) Unreported. (2) [1894] 1 I. R. 316.

Appeal. 1917. O'MEAGHER v. DALY. Sir Ignatius J. O'Brien C.

obtained a valuation of £800 on the lands has not at all the same weight in favour of the appellant as his counsel seek to lay upon it. The actual pre-emption price obtained was £500—£300 less than the amount of the valuation made. The possibility of that reduction taking place was a matter for consideration for the appellant when he commenced his proceedings. Then the prior charges amounted to £467, and the costs of the proceedings—which certainly would not be less than £100—had also to be taken into account. I think only a very sanguine incumbrancer in the position of the appellant would have said he had a reasonable expectation of having his demand reached. I do not think the appellant had any grounds for such expectation.

In a country such as this, where it is usual to find estates "blistered," as it has been said, with petty charges, it would seem to me undesirable that the owner of a puisne charge on such an estate should be allowed to obtain his costs of an endeavour to realize his security at the expense of prior incumbrancers, unless he establishes some very special equity in his favour; and I can find no ground for the suggestion that a rule or practice to this effect is in existence.

It is also said that the appointment of a receiver by the appellant is a matter to be taken into consideration. I am quite unable to appreciate this contention. The appellant did nothing except what he considered advisable in the protection of his own interests. It is contended finally that some special merit attaches to the appellant by reason of the increase that took place in the pre-emption price of the lands, the £200 offered by the landlord having been raised by the order of the Sub-Commission to £500. It is clear, however, that no order in the suit was ever made by which the appellant was directed to contest this matter of the pre-emption price in the Court of the Sub-Commission, nor was any direction to do so given in Chambers. Mr. Solomon was not a party to the suit, he never attended in Chambers, and whatever was done in the matter of the pre-emption price was done without his knowledge or adoption. The action of the appellant in this respect no more constitutes a special circumstance in his favour, to entitle him to priority in his costs, than did the display of exceptional skill and diligence on the part of the puisne incumbrancer's

solicitor in *Taylor* v. *Gorman* (1). Everything that was done appears to me to have been done for the benefit of the appellant himself. It is his misfortune that the lands did not realize sufficient money to enable his charge to be paid; but according to no rule of law applicable in this country can he claim to have his costs paid out of the proceeds of the sale in such priority as would affect the claims of a prior incumbrancer. The order of Barton J. must be affirmed with costs.

RONAN L.J.:—

In this case the facts are stated in the report in the Court below and in the judgment of Barton J. The passage in Halsbury referred to will be found at pp. 341-2 of the report. It assumes that a subsequent incumbrancer may institute proceedings "in his own interest only," and that in such a case he only gets his costs with his demand. If there ever was such a case, surely this is one. If the mere facts that an account is always taken of the prior incumbrances, and that they are paid off out of the proceeds of the sale, were sufficient to entitle him to priority for his costs, this would necessarily give priority in every case. The plaintiff's action was simply to realize his security. What was his security?—the mortgagor's interest subject to that of the prior incumbrancers. They did not want a sale or any costly litigation. There is no suggestion that they did. Their securities were their own property. What right has a person to say—I will bring an action to see if I can make anything out of this security? If it should turn out that my security is worthless, I shall make other people pay my costs out of their property. In any case, my solicitor is a decent fellow, and this will give him a well-paid job in any event and cost me nothing.

I agree with Barton J., that if the case were governed by the principle stated in Halsbury, the plaintiff would not be entitled to the priority sought for his costs. It is plain from the cases of *Peyton* v. *M'Dermott* (2), *Taylor* v. *Gorman* (1), and *Nelson* v. *Brady* (3), that the Irish rule as to giving priority to the costs

(1) 1 Dr. & Walsh, at p. 235 *n*. (2) 1 Dr. & Walsh 198, at p. 234.
(3) 4 I. E. R. 359.

Appeal. 1917.

O'MEAGHER v. DALY.

Ronan L.J.

of a plaintiff whom the fund has failed to reach operated much more severely against the plaintiff than the English rule. In the last of these cases Lord St. Leonards says:—"When I consider the number of judgments in this country and the desire to fasten them on property, I confess I think the rule" (the Irish rule) "not an unwholesome one. . . . I shall, therefore, leave the rule as I find it." This plainly means that it was necessary to prevent puisne incumbrancers from taking such proceedings as the present. In that case he allowed priority to part of plaintiff's costs, but the facts were very peculiar. E. B., a minor, was first incumbrancer in respect of a charge of £3,000, on which £3,737 was due. N. was a judgment creditor. There was due to him £192. In 1826 a suit was brought on behalf of E. B. to realize her charge. Her solicitor died and there was delay. N. then filed a bill on foot of his charge, making E. B. a defendant. E. B.'s new solicitor applied to have her bill dismissed or proceedings stayed. This was done. A decree for sale was made in N.'s suit. E. B.'s charge was declared prior to N.'s. N., finding that the fund was not likely to reach him, gave up prosecuting the suit, and the carriage of N.'s suit was transferred to E. B.'s solicitor. N. had incurred certain costs under the decree in proving title, preparing conditions of sale, &c. In these extreme circumstances Lord St. Leonards refused to give priority to N.'s costs generally, but only allowed priority to those mentioned above. They were costs that must have been incurred by E. B. in her own suit if it had gone on. She stayed her own suit in order to take advantage of his, and finally obtained carriage of it, and realized her security through it. I have stated these facts in detail, as the marginal note of this case might seem to show that the plaintiff in the present case ought to get a portion of costs. The main distinctions between the cases are—(1) that in the present case there would have been no costs at all if plaintiff had not brought this action; (2) that the prior incumbrancer in no way adopted the plaintiff's action. He did not even take the step for proceeding under Order 16, rules. 40 and 41, by serving notice of the judgment on the prior mortgagees. They first heard of it in the publication of the notice for incumbrancers, and they sent on particulars of their claims to prevent the distribution

of their fund without payment to them. This was in no way an adoption of plaintiff's proceeding. The principal argument for plaintiff was as follows:—It is said that plaintiff had reason to believe that the fund would reach him. As to this, I agree with what the Lord Chancellor said as to the figures. We cannot ignore what was said by Lord Plunket in *Peyton* v. *M'Dermott* (1): "As to the ground assigned of the demand being a fair one, this would introduce a new rule, and one which would render necessary in every case an inquiry as to the probable or possible expectations of the parties with regard to the produce of the fund—a rule, which, in my opinion, could not be acted upon." But, apart from all this, what is the plaintiff's case? Admitting the £800 valuation, he says the exercise of the landlord's right of pre-emption was what caused the failure of the fund to reach him. But this right was known to exist. If a man can buy for £500 what is worth £800, why should he not do so? Counsel says landlords seldom do so. Why? In my opinion, if the plaintiff overestimated the influence of intimidation and the boycott, it is no reason for making persons on whom he has no claim pay his costs. I think the question was one for the exercise of the discretion of Barton J. on the whole case, and that he exercised it rightly.

MOLONY L.J.:—

The plaintiff, the sixth incumbrancer on a yearly tenancy, brought proceedings, claiming an account of the sum due to him, and that payment might be enforced by a sale. He obtained a primary decree on the 8th December, 1913, and under that order he gets the costs of and incidental to the application with his demand. Knowing this, he proceeded to sell. The landlord exercised his right of pre-emption, with the result that the price fixed by the Irish Land Commission was not sufficient to reach the plaintiff. It is contended, notwithstanding, that he is entitled to be paid the costs of the proceedings in priority to the incumbrances. I am satisfied on all the authorities that the plaintiff is not so entitled, and that to give effect to his contention here

(1) 1 Dr. & Walsh 234.

Appeal. 1917. O'MEAGHER v. DALY. Molony L.J.

would be not only to go behind the old cases which have been referred to—of *Handcock* v. *Handcock* (1), *Peyton* v. *M'Dermott* (2), and *Nelson* v. *Brady* (3), but in effect to reverse the decisions of this Court in *Hilliard* v. *Moriarty* (4) and *M'Spadden* v. *Paterson* (5). I am unable to find any special circumstances which would justify us in departing from the settled practice of the Court.

Solicitors for the appellant: *O'Meagher & Sons.*
Solicitor for the respondent: *W. G. Armstrong.*

R. ST. J. C.

(1) 1 I. E. R. 444.
(2) 1 Dr. & Walsh 198.
(3) 4 I. E. R. 359.
(4) [1894] 1 I. R. 316.
(5) 39 I. L. T. R. 122.

HIBERNIAN BANK *v.* YOURELL AND OTHERS. *H. L.* 1917. Oct. 29.

[1916] 1 I. R. 312, 321.

THE House of Lords has reversed the decision of the Court of Appeal and restored the decision of O'Connor M.R.

IN RE COLLES' ESTATE. *Appeal.* 1917. Nov. 22

THE Court of Appeal has affirmed the judgment of Wylie J. in this case, reported ante, p. 260. See [1918] 1 Ir. R. 1.

IN RE OWEN SMITH. *Appeal.* 1917. June 5.

THE Court of Appeal, Sir I. J. O'Brien C. dissenting, have affirmed the judgment of Madden J., reported *ante*, p. 170. See [1918] 1 Ir. R., p. 45.

INDEX.

ACCRUED SHARES—Subject to conditions affecting original shares - M.R. 194
See WILL—CONDITION.

ADMINISTRATION — ACTION — Costs — *Deficiency of assets—Donatio mortis causa—Unsuccessful action to obtain probate—"Testamentary expenses."*] Two persons, who were named as executors in what purported to be the will of the deceased, on the advice of senior counsel, instituted an action to obtain a grant of probate of the alleged will. The jury found against the alleged will, which was condemned, but the executors were declared entitled to their costs out of the assets. Subsequently to the trial of the probate action a suit was brought for the administration of the estate of the deceased, which mainly consisted of a sum of £923 standing on deposit receipt. These moneys were adjudged by Barton J. and by the Court of Appeal to have been the subject-matter of a good donatio mortis causa to R. Nearly all the costs incurred by the executors in the probate action had been incurred before R. put forward his claim to the ownership of the deposit receipt. There was a deficiency of assets. *Held*, that the moneys on deposit receipt were not assets, and were not liable for the payment of any of the costs of the probate action. *Kelly* v. *O'Connor* - - BARTON J. 312

ADMINISTRATOR—Sale by, for distribution among next-of-kin - - 472
See VENDOR AND PURCHASER—TITLE. 3.

ADVANCEMENT—Husband and Wife—*Deposit Receipt in Joint Names of Husband and Wife—Money payable to Husband or Wife or the Survivor—Reservation of Power to revoke gift.*] A sum of money was placed by a man on deposit receipt in bank in the names of himself and his wife, but it was payable to him or his wife, or the survivor. Shortly before his death he endorsed and handed the deposit receipt to the defendant, a clergyman, for charitable purposes, who cashed it forthwith. The plaintiff, widow of the deceased,

ADVANCEMENT—*continued.*

brought an action against the defendant for a return of the money on the ground, amongst others, that there was a gift of the money to her by way of advancement in the event of her surviving her husband, and that he, having made the gift, was not competent to withdraw it. *Held*, that the deceased gave to himself or his wife the power to withdraw the money, and that this was a reservation of a power to revoke the gift which he was entitled to make, and that the action could not be maintained. *M'Dowell* v. *M'Neilly*.
M.R. 117

ADVANCEMENT—Shares in joint names of husband and wife - - - 38
See ELECTION—DOCTRINE OF.

——— Of infant—Reversionary interest 181
See INFANT.

ANNUITY—Bequest of Annuity to Daughter until Marriage—*Proviso for cesser of the Annuity on Marriage, and gift of capital Sum in substitution—Death of Daughter unmarried—Absolute Gift—Gift for Life.*] A testator bequeathed to his daughter until she should marry an annuity of £125, and provided that on her marriage the annuity should determine, and in lieu thereof he bequeathed to her the sum of £2500 with interest at 5 per cent. The annuity and legacy were charged upon the testator's real estate, which was devised to his son; and the will provided that the legacy should not be called in, unless the interest thereon fell into arrear, without notice to the testator's son, but that he or his heirs, &c., were to be at liberty to redeem the annuity at any time on giving notice of their intention so to do. *Held*, that the will manifested the intention of the testator to make a personal provision for his daughter during her life so long as she remained unmarried, and in the event of her marriage to give her a fortune, and that the annuity determined upon her death unmarried. *Rishton* v. *Cobb*

ANNUITY—*continued.*

(5 M. & C. 145) distinguished; *Boddington* v. *Clairat* (25 Ch. D. 685), *Mason* v. *Mason*, [1910] 1 Ch. 695, followed. *In re Barklie*; *M'Calmont* v. *Barklie* - - - - - - M.R. 1

APPORTIONMENT AND REDEMPTION of head rent - - - - - 11, 16
See LAND PURCHASE ACTS — SUPERIOR INTEREST. 1.

ARBITRATION—Disputes between Industrial Society and Members - - 93
See INDUSTRIAL AND PROVIDENT SOCIETY.

ASSESSOR'S REPORT—Evidence—Fair rent [145
See LAND LAW ACTS — CHARACTER OF HOLDING. 2.

ASSETS—Donatio mortis causa—Not for payment of administration costs - 312
See ADMINISTRATION ACTION.

AUCTIONEER—Memorandum of sale of lands by - - - - - - - 348
See FRAUDS, STATUTE OF.

CASES—*Attorney-General for Ireland* v. *Proby* ([1916] 2 A. C. 468) applied - 270
See LAND PURCHASE ACTS — SUPERIOR INTEREST. 3.

—— *Belfast Guardians* v. *Belfast Corporation* (No. 1) ([1910] 2 Ir. R. 534) followed [M. R. APP. 401
See LOCAL GOVERNMENT—RATES.

—— *Boddington* v. *Clairat* (25 Ch. D. 685) followed - - - - - - - 1
See ANNUITY.
See WILL—CONSTRUCTION.

—— *Boyd's Trusts*; *Devereux* v. *Calm* ([1916] 1 I. R. 121) affirmed . . 56
See SETTLEMENT—CONSTRUCTION.

—— *Chapman* v. *Brown* (6 Ves. 404) distinguished and dissented from - - - 183
See CHARITY—GIFT TO. 3.

—— *Douglas, In re*; *Obert* v. *Barrow* (35 Ch. D. 472) distinguished - - M. R. 388
See CHARITY—GIFT TO. 1.

—— *Hearle* v. *Hicks* (1 Cl. and Fin. 20) applied.
See WILL—REVOCATION. [337

—— *Hunter* v. *Attorney-General* ([1899] A. C. 309) followed - - - M. R. 388
See CHARITY—GIFT TO. 1.

—— *Kilkelly* v. *Powell* ([1897] 1 Ir. R. 457) distinguished - - - - - 250
See WILL—WORDS. 1.

—— *Mackesy* v. *Mackesy* ([1896] 1 Ir. R. 511) distinguished - - - - - 250
See WILL—WORDS. 1.

CASES—*continued.*

—— *Mason v. Mason* ([1910] 1 Ch. 695) followed - - - - - - 1
See ANNUITY.

—— *Mount-Cashell* v. *Smyth* ([1895] 1 I. R. 346) discussed - - - 286, 289
See WILL—REPUBLICATION BY CODICIL.

—— *Newbegin* v. *Bell* (23 Beav. 386) followed
See WILL—CHARGES. [278, 280

—— *O'Mahony* v. *Burdett* (4 R. 7 H. L. 388) considered - - - - - 260
See SETTLEMENT—CONSTRUCTION. 1.

—— *Pentland's Estate* (22 L. R. Ir. 649) explained - - - - - 11, 16
See LAND PURCHASE ACTS — SUPERIOR INTEREST. 1.

—— *Rishton* v. *Cobb* (5 M. & C. 145) distinguished - - - - - 1
See ANNUITY.

—— *Smith* v. *Savage* ([1906] 1 Ir. R. 469) followed - - - - - - 17
See LIMITATIONS, STATUTE OF—REALTY.

—— *Stoodley, In re* ([1915] 2 Ch. 295) applied.
See WILL—REVOCATION. [337

—— *Vanneck* v. *Benham* ([1917] 1 Ch. 60) applied - - - - - - 165
See WILL—WORDS. 2.

CHARITY—Bequest to executors for the testator's "best spiritual advantage" 448
See WILL—UNCERTAINTY.

1. CHARITY — GIFT TO — "Bequest for establishing a monastery, or any other religious, ecclesiastical, or charitable institution"—*Failure of gift.*] A bequest to a trustee "for establishing a monastery, or any other religious, ecclesiastical, or charitable institution which he in his absolute discretion shall think fit, or partly for such purpose or purposes, and partly for masses for the repose of the souls of the testatrix's family," is not a good charitable bequest. The will contained a provision whereby, in the event of any question arising as to the legality or validity of the devises and bequests, or if any such devise or bequest should be illegal or invalid, the testatrix gave, devised, and bequeathed all her property to the trustee absolutely without any trust, condition, or obligation. *Held*, that the charitable gift having failed, the property went to the trustee absolutely under the ultimate gift over. *In re Douglas, Obert* v. *Barrow*, 35 Ch. D. 472, distinguished; *Hunter* v. *Attorney-General*, [1899] A. C. 309, followed. *Commissioners of Charitable Bequests* v. *M'Cartan and others* [M. R. 388

2. CHARITY — GIFT TO — "Presbyterian Missions and Orphans"—*Validity of Gift.*] By her will a testatrix gave her residuary estate

CHARITY—*continued.*

"Presbyterian Missions and Orphans, and to A. S., £20." *Held*, that the gift to "Presbyterian Missions and Orphans" was a good charitable gift. *Jackson* v. *The Attorney-General* [Barton J. 332

3. **CHARITY — GIFT TO — Uncertain Amount**—*Failure of—Gift of Surplus.*] Lands were devised to trustees on trust to apply the profit rents for the erection of a parish chapel and parochial house on parts of the lands called the chapel field, which was expressly devised on trust for the accommodation of the parish priest for the time being of the parish of C. and his successors, and when the chapel and house were built, the rest of the lands were to be held upon trust to pay one-half of the profit rents to the parish priest for the time being for masses, and the other half amongst the poor of the parish, to be divided amongst them every Christmas by the trustees and the parish priest for ever. There was no residuary devise in the will. The lands were sold, and the net proceeds, amounting to £1443, were paid to the Commissioners of Charitable Donations and Bequests. There was no need to erect a parish chapel or parochial house, as there were a parish chapel and parochial house in the immediate neighbourhood. An originating summons having been taken out by the trustees to determine the construction of the will and the disposal of the fund: *Held*, that the gift for masses, and for the poor, was a devise of the whole, subject to a gift that failed, and not a gift of the residue after a void gift, and accordingly that the whole net proceeds of sale were applicable to these valid charitable objects. *Chapman* v. *Brown*, 6 Ves. 404, distinguished, and the principle of that case considered and dissented from. *Kelly* v. *Attorney-General* - - - - - - M.R. 183

COMPANY—DEBENTURES, Validity of—*Estoppel — Res Judicata — Test Action, Order XVI, R.* 8.] By a deed executed in 1895, property of a distillery company was conveyed to trustees for the holders of second debentures to be thereafter issued. The articles of association of the company provided that no director should vote in respect of any matter in which he was individually interested, the quorum of directors being fixed at two. *D.*, a director of the company, advanced moneys to the company on the security of manufactured whiskey of the company stored in a warehouse, and also upon second debentures issued to him by the company in 1903, but forming part of the series secured by the trust deed of 1895. There was admittedly no quorum of independent directors present at the meeting which purported to authorize the issue of these debentures to *D.* The present

COMPANY—*continued.*

action was instituted in 1905 by the plaintiff on behalf of himself and all other holders of first debentures claiming a declaration that certain first mortgage debentures were well charged on the property of the company, and a liquidator was subsequently appointed (*Cox* v. *Dublin City Distillery*, [1906] 1 I. R. 446; [1915] 1 I. R. 345). In 1909 *D.* instituted an action for a declaration as to his rights against the company in liquidation and the trustees for the second debenture-holders. The latter defendants delivered no defence, and *D.* obtained judgment against them by default. The company impeached *D.*'s right to claim a lien on the second debentures, on the ground that these were not registered under the Companies Act, 1900, but no point as to the absence of a proper quorum at the meeting which purported to authorize the issue of *D.*'s debentures was either pleaded or specifically relied upon in argument. *D.*'s action subsequently resulted in a declaration by the House of Lords that *D.* was not entitled to a valid pledge of the whiskey, but was entitled to a valid lien on the debentures for the amount of his advances to the extent of the property comprised in the trust deed. On the hearing of a memorandum from the Chief Clerk in the present action: *Held*, by the Court of Appeal (1), reversing the order of Barton J., that *C.*, *R.*, and *G.*, as representing the holders of valid second debentures issued by the company in 1895, were sufficiently represented by the trustees for the second debenture-holders in the action brought by *D.* against the company and the said trustees, and that the order of the House of Lords in the latter action operated as an estoppel so as to preclude *C.*, *R.*, and *G.* from relying in the present action on the invalidity in the creation of *D.*'s debentures. *Cox* v. *Dublin City Distillery Company, Ltd.* (No. 3.) [Barton J.; App. 203. 208.

COMPANY — WINDING UP — "Just and Equitable" Clause—*Shareholders' Petition — Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *sect.* 129, *sub-s.* 6—*Appropriation of Profits by Managing Director — Vicious Career.*] The power of the Court to order the winding up of a company as being just and equitable under sub-s. 6 of sect. 129 of the Companies (Consolidation) Act, 1908 (corresponding to sect. 79 of the Companies Act, 1862), is not confined to cases the circumstances of which are *ejusdem generis* with those mentioned in the preceding sub-sections. *L.*, the managing director of a laundry company, entered into contracts in his own name for work to be done by the company, the profits of which amounted to £3268, of which *L.* accounted to the company for £1038 only. This he alleged was done with the consent of his co-directors. The capital of the

COMPANY—*continued.*
company consisted of 2000 £1 shares, the majority of which were controlled by the managing director and a co-director who was a business partner of *L.* In an action brought by two shareholders against the company and *L.*, to compel an account of the profits so received, an order was made that he should so account; but no payment was made or account rendered by *L.*, and no steps were taken by the company to compel him to account, and subsequent to the action a resolution of confidence in his management was passed by a majority of shareholders at a general meeting. The plaintiffs in the action having presented a petition to wind up the company on the ground that in the circumstances it was "just and equitable" that the company should be wound up: *Held*, by the Court of Appeal, affirming the decision of the Master of the Rolls, that a winding-up order should be made. *In re the Newbridge Sanitary Steam Laundry, Ltd.* - - - - - - M. R. APP. 67, 75

CONTINUING PROCEEDINGS — Mortgage suit — Application by puisne Incumbrancer - - - - - 49
See PRACTICE—PARTIES.

CONTRIBUTION to fee-farm rent—liability of indemnified lands to - - 156
See RENEWABLE LEASEHOLD CONVERSION ACT.

COSTS—Administration Action—Donatio mortis causa—Deficiency of assets - 312
See ADMINISTRATION ACTION.

COSTS of puisne incumbrancer—Mortgage Suit — *Priority — Special circumstances.*] The plaintiff, who was seventh in priority as an incumbrancer on lands of the defendant, instituted an action to raise the amount of his charge, and obtained a primary decree for sale. The lands were held under a tenancy from year to year, and notice of intention to sell having been served upon the landlord, the latter exercised his right of pre-emption, and offered £200 as the pre-emption price. The true value of the lands was subsequently ascertained by the Court of the Irish Land Commission to be £500, the Land Commission proceedings having been carried through by the plaintiff without any order in the suit directing him to do so. The sum of £500 was only sufficient to discharge the first five incumbrances, and portion of the sixth, no part of the plaintiff's demand being reached. The owner of the sixth incumbrance had proved his claim thereto, but otherwise took no part in the suit. *Held*, by the Court of Appeal (affirming the judgment of Barton J.), that the plaintiff was only entitled to be paid his costs in the same priority as his incumbrance, and that no special circumstances existed

COSTS—*continued.*
entitling the plaintiff to priority in payment of his costs. *Per* Ronan L.J.:—In such a case the Court will not enter upon an inquiry as to whether the puisne incumbrancer had a reasonable expectation of being paid when he commenced his proceedings. *O'Meagher* v. *Daly.*
[BARTON J., APP. 341-493

DATE of Will—Brought down to date of Codicil by republication - - - 286
See WILL—REPUBLICATION BY CODICIL.

DISCHARGE OF EQUITIES—On application of person not owner - - - 170
See LAND REGISTRY. 1.

DISTRIBUTION, PERIOD OF - 260
See SETTLEMENT—CONSTRUCTION. 1.

DONATIO MORTIS CAUSA—Not liable for costs of administration - - 312
See ADMINISTRATION ACTION.

DUBLIN POLICE RATE — Apportionment between county borough and outside area - - - M.R.; APP. 401
See LOCAL GOVERNMENT—RATES.

ELECTION (DOCTRINE OF)—Will—Bequest to Wife of Legacy payable out of Shares standing in Joint Names of Husband and Wife—*Bequest of Life Estate in Residue to Wife.*] A testator whose property at his death (exclusive of certain stocks and shares standing in the joint names of the testator and his wife, which at his death became, by survivorship, the absolute property of his wife) amounted in value to £1858, by his will gave his wife a legacy of £3000, "same to be paid to her either in cash or in such of my shares (including shares standing in her name jointly with mine) as she may select," and directed his executors to hold the residue of his property upon trust to pay the income to his wife during her life, and after her death to apply two-thirds in favour of a brother's children, and to hold one-third on a certain educational trust. *Held*, by the Court of Appeal (affirming Barton J.), that the testator's widow was bound to elect between the benefits conferred by the will and her claim to any of the stocks and shares invested in the joint names of herself and the testator. *In re Sullivan, Sullivan* v. *Sullivan.* - [APP. 38

ESTOPPEL - - - - - - 194
See COMPANY—DEBENTURES.

EXTRINSIC EVIDENCE - 286, 289
See WILL—REPUBLICATION BY CODICIL.

FRAUDS (STATUTE OF)—Sale of Lands—*Memorandum in writing—Entry in Auctioneer's Book—Conditions of Sale—Signature by Auctioneer*

FRAUDS (STATUTE OF)—*continued.*
on day after Sale—Auctioneer's Authority as Vendor's Agent.] On a sale of lands by public auction, the note in the auctioneer's book contained particulars taken from the conditions of sale, the biddings, a statement that the lands were sold to the plaintiff for £2100, and the auctioneer's signature. The particulars were filled in before the sale; the rest of the note on the following morning. *Held*, that the auctioneer's note sufficiently referred to the conditions of sale to constitute with the latter a good memorandum within the Statute of Frauds. *Held* also, that the authority of an auctioneer as agent for a vendor is of a more permanent character than his authority as agent for a purchaser—the test being, was the memorandum in substance made at the time and as part of the transaction of sale? *M'Meekin* v. *Stevenson.* - - - - Ross J. 348

FRAUDULENT BREACH OF TRUST—Sale by Irish Land Commission to recover Arrears of Annuity—*Settlement—Holding purchased under the Land Purchase Acts—Purchasing Tenant a Limited Owner—Collusion between purchasing tenant and purchaser at sale—Purchaser declared a trustee for a person entitled in remainder.*] *A* and *B* (his wife) were entitled under a settlement to lands held under a tenancy from year to year for their joint lives. *A* and *B* purchased the holding under the provisions of the Purchase of Land (Ireland) Acts, and they were registered as limited owners thereof under the provisions of the Local Registration of Title (Ireland) Act, 1891. With a view to making title to the absolute interest in the lands they allowed the purchase annuity to run into arrear, and on the lands being put up for sale by the Irish Land Commission, the defendant, who was privy to the transaction, bought them for a sum sufficient to cover the outstanding arrears of the annuity. The plaintiff represented the persons entitled in remainder under the settlement. *Held*, that *A* and *B* had been guilty of a breach of trust amounting to a fraud to which the defendant had been a party, and that the defendant must be held to be a trustee of the lands for the plaintiff. *Hahesy* v. *Guiry.* - - - - - - M.R. 371

HEIRS in relation to Personalty - - 63
See WILL—LIMITATIONS.

HUSBAND—Bequest to husband of unmarried daughter - - - - 461
See WILL—VESTING. 1.

HUSBAND AND WIFE—Deposit receipt in joint names of, or survivor M.R. 117
See ADVANCEMENT.

INDEMNITY against rent - - - 156
See RENEWABLE LEASEHOLD CONVERSION ACT.

INDUSTRIAL AND PROVIDENT SOCIETY—Disputes between Society and Members—*Rules—Arbitration—Rules alleged to be ultra vires—Stay of Proceedings—Industrial and Provident Societies Act*, 1893 (56 & 57 *Vict. c.* 39), *s.* 49.] The rules of an industrial and provident society provided for the reference of all disputes between the society and its members to the Irish Agricultural Organization Society. A member of the society commenced an action against the society for a declaration that certain new rules adopted by the society were ultra vires the society, and not binding upon him, and for consequential relief. *Held*, that the plaintiff's claim was not a dispute within the arbitration rule and s. 49 of the Industrial and Provident Societies Act, 1893, and that the defendant society's motion to stay proceedings in the action ought accordingly to be refused. *M'Ellistrim* v. *The Ballymacelligott Co-Operative Agricultural and Dairy Society, Limited.* [APP. 93

INFANT—Maintenance and Advancement—*Reversionary Interest—Sum advanced charged on Corpus—Form of Order.*] Where an infant's sole property was a sum of £2500 payable on the death of his father, the Court made an order charging a sum required for his present maintenance and advancement with interest at 6 per cent. on the principal sum, and providing that the sum to be advanced and interest thereon should be repaid only when the principal sum became payable. *Morgan, deceased; Morgan* v. *Morgan.* [M. R. 181

LAND PURCHASE ACTS—Collusive Purchase at sale by Land Commission for default in payment of Annuity - - - 371
See FRAUDULENT BREACH OF TRUST.

1. LAND LAW ACTS—CHARACTER OF HOLDING—Crucial Date—Redemption of Rent (*Ireland*) *Act*, 1891 (54 & 55 *Vict. c.* 67)—*Application to redeem Rent.*] In an application by lessees to have the rent of a holding redeemed under the provisions of the Redemption of Rent (Ireland) Act, 1891, the main question in issue was whether the premises were substantially agricultural or pastoral. *Held* (reversing Fitz Gerald J.), that the crucial time for ascertaining the status of the holding, as distinguished from the status of the tenant, was the date of the passing of the Land Law (Ireland) Act, 1896. *Sartoris* v. *Shackleton* [APP. 129

2. LAND LAW ACTS—CHARACTER OF HOLDING — Town-Park — Nursery — *Fair*

LAND LAW ACTS—*continued.*

Rent—"Ordinary Agricultural Farm"—Accommodation Land—Practice—Evidence—Assessor's Report—Land Law (Ireland) Act, 1887, *sect.* 9—*Land Act*, 1896, *sect.* 7—*Irish Land Act*, 1903, *sects.* 88 (2), 89.] Where no evidence is given on the hearing of a fair rent appeal to show that a holding, alleged to be a town-park, bears an increased value as accommodation land, the judicial commissioner cannot act upon a statement to that effect in the report of his assessor. A holding used as a nursery for the growing of forest-trees, flowers, and such like, may be an agricultural holding. (Per Ronan L.J.) A holding so used, though agricultural in its character, is not "let and used as an ordinary agricultural farm" within the meaning of the Land Law (Ireland) Act, 1887, sect. 9. *Saunders* v. *Hamilton.* - APP. 145

1. LAND PURCHASE ACTS—SUPERIOR INTEREST—Apportionment and Redemption—*Rights of Owner of Head-Rent—Land Law (Ireland) Act*, 1887 (50 & 51 *Vict. c.* 33), *sect.* 16, *sub-s.* 3—*Mode of fixing Price of superior Rent where Price of immediate Head Rent previously fixed.*] Under sect. 16, sub-s. 3, of the Land Law (Ireland) Act, 1887 (50 & 51 Vict. c. 33), all that the owner of a part of an annuity, rentcharge, or rent apportioned upon land sold, is entitled to require is the redemption of such annuity, rentcharge, or rent, or of an apportioned part thereof. Under the discretionary parts of the sub-section, the Court may, in any proper case, whether apportionment has been made or not, redeem the whole of any annuity, rentcharge, or rent affecting land sold. In the ordinary course, a head-rent payable out of land sold and other land will be apportioned, and the part apportioned on the land sold redeemed, unless there are special circumstances which render it expedient to redeem the whole rent. So *held* by Wylie J., and affirmed by the Court of Appeal. *In re Pentland's Estate* (22 L. R. Ir. 649) explained. The mode of fixing the redemption price of a superior head-rent, where the price of the immediate head-rent had been previously fixed, discussed. *In re Barry's Estate*

[WYLIE J., APP. 11, 16

2. LAND PURCHASE ACTS—SUPERIOR INTEREST—Redemption—*Agreement fixing price—Time—Irish Land Act*, 1903, *sect.* 64—*Land Purchase Acts Rules, 2nd July*, 1910, *Order* 8, *r.* 4.] For the redemption under the Land Purchase Acts of a superior interest in normal conditions two orders are requisite—one an order for redemption; second, an independent order, fixing the redemption price. The parties had, in 1914, entered into a formal consent agreeing upon the price; but no order for redemption had been made. Under Order 8, rule 4, of the

LAND PURCHASE ACTS—*continued.*

Land Purchase Acts Rules of the 2nd July, 1910, the time for parties to agree upon the redemption price of a superior interest is "within one month from the date of the order for redemption." *Held*, that the time prescribed by the rule is within a period of one month, commencing with the date of the order for redemption, and ending one month from that date, and that the consent did not comply with the rule. *Ponsonby's Estate* 466

3. LAND PURCHASE ACTS—SUPERIOR INTEREST — Redemption — Quit Rent—*Jurisdiction of Land Commission to fix Redemption Price without consent of Commissioners of Woods and Forests—Land Law (Ir.) Act*, 1887 (50 & 51 *Vict. c.* 33), *sect.* 15, *sub-s.* 3—*Land Law (Ir.) Act*, 1896 (59 & 60 *Vict. c.* 47), *sect.* 31, *sub-ss.* 1, 3, 8—*Irish Land Act*, 1903 (3 *Ed.* 7, *c.* 37), *sect.* 64.] Sect. 15, sub-s. 3, of the Land Law (Ir.) Act, 1887, is impliedly repealed by sect. 31 of the Land Law (Ir.) Act, 1896, and accordingly quit rent, payable out of lands sold under the Land Purchase Acts, will be redeemed, and the redemption price fixed, without the consent of the Commissioners of Woods and Forests. *Attorney-General for Ireland* v. *Proby*, [1916] 2 A. C. 468, applied. *Edgeworth's Estate* - - WYLIE J. 270

1. LAND REGISTRY—Discharge of Equities—*Application by Person other than the Registered Owner—Jurisdiction of Registrar—Practice—Substantive Proceedings when proper—Fraud—Mistake—Oral evidence.*] A person whose title to land registered subject to equities arises under instruments executed prior to first registration, is entitled to apply to the registrar to investigate the title, and the registrar has jurisdiction to entertain such an application. The practice of discharging equities on the application of an interested person other than the registered owner, approved. The registrar has jurisdiction under sect. 29 of the Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66), to deal with a claim founded on an equity, even though the claim is one which might be made the subject of substantive proceedings in a court of competent jurisdiction. But where the application raises a question of actual fraud or mistake coming within sect. 34, sub-s. 1, of the Act of 1891, the registrar would as of course decline to entertain it. Where important interests are involved, or it is desirable that evidence should be taken orally, the registrar should adjourn the hearing of the application to discharge equities in order that substantive proceedings may be taken. *Re Owen Smith* - - MADDEN J. 170

2. LAND REGISTRY—Receivership Deed—*Registration on Folio—sect.* 45, *sub-s.* 1 (*e*)—*Rules of* 1910, *Order IV, rule* 20.] A receivership deed

LAND REGISTRY—*continued.*

should be registered on the folio, as being a burden affecting the registered land. *Re M'Evoy, A Registered Owner of Land* (1) MADDEN J. 168

3. **LAND REGISTRY**—Rectification of Map —*Land Registry—Practice—Sect.* 34 *of the Local Registration of Title* (*Ireland*) *Act*, 1891 (54 & 55 *Vict. c.* 66)—*Order VI, rule* 1.] A dispute arose between the registered owner of land registered under the Local Registration of Title (Ireland) Act, 1891, and the owner of turbary rights thereon as to the plot over which the latter was entitled to exercise such rights, the latter contending that the map was incorrect in this respect, the former contending that there was no mistake. *Held*, that the case did not come within s. 34, sub-s. 2, of the Act, or Order VI, Rule 1, (1) (*a*) (ii) of the rules made thereunder, and that accordingly an application to the Court to refer the question to the County Court was misconceived. Any proceeding taken under s. 34, sub-s. 1, of the Act on the ground of fraud or mistake should be by an independent proceeding in a court of competent jurisdiction—in the present case, the equity side of the county court. *In re Buckley* - MADDEN J. 47

LAND REGISTRY — Registration — Subdivision without consent of Land Commission—(54 & 55 *Vict. c.* 66), *sect.* 35, *sub-s.* 1, *and sect.* 38, *sub-s.* 1—*Owner of Subdivided Portion —Prohibition of Alienation—Landlord and Tenant* (*Ireland*) *Act*, 1870 (33 & 34 *Vict. c.* 46), *sect.* 45—*Landlord and Tenant* (*Ireland*) *Amendment Act*, 1872 (35 & 36 *Vict c.* 32), *sect.* 2—*Land Law* (*Ireland*) *Act*, 1881 (44 & 45 *Vict. c.* 49), *sect.* 30—*Irish Land Act*, 1903 (3 *Ed.* 7, *c.* 37), *sect.* 54.] When the proprietor of a holding purchased under the Irish Land Act of 1903, subject to a land purchase annuity, purports to subdivide his holding without the consent of the Land Commission, the person in whose favour such attempted subdivision is made is not entitled to be registered as owner under the Local Registration of Title (Ireland) Act, 1891. *In re Mary Geoghegan* - - ROSS J. 361

LIMITATION, NO WORDS OF - 260
See SETTLEMENT—CONSTRUCTION. 1.

LIMITATIONS, STATUTE OF—REALTY —Intestacy—*Next-of-Kin in Possession—Other Next-of-Kin out of Possession for more than Twelve Years—Joint Tenancy in Acquired Shares—Partnership—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 20, *sub-s.* 3—*Partners as to Profits—Purchase of other Land out of Profits made by use of Land held in Co-ownership—Tenancy in Common of Purchased Lands.*] Two of the next-of-kin of the yearly tenant of a farm, who died intestate, acquired a title under the Statute of Limitations to the shares

LIMITATIONS—*continued.*

of the other next-of-kin. They worked the farm together, and treated the profits as divisible equally between them. They subsequently purchased four other farms with the profits made out of the original farm, and worked them in the same way. Two of the farms were purchased before the Partnership Act, 1890, came into operation, and two after that date. All the farms were bought out under the Land Purchase Acts, and were registered subject to equities, four in the name of one, and one in the joint names of the two. On the death of one intestate the survivor took out administration to him. An action was afterwards brought to administer his estate by one of his next-of-kin. A question arose in the administration, viz., whether the farms were held by the two as tenants in common, or as joint tenants. *Held* (1), that the original farm was held as to the original shares of the two next-of-kin by the plaintiff and the defendant as tenants in common, and as to the acquired shares by them as joint tenants. *Smith* v. *Savage*, [1906] 1 I. R. 469, followed. (2) That the farms purchased with the profits of the original farm were held by the plaintiff and the defendant as tenants in common, and that sect. 20 of the Partnership Act, 1890, did not apply. *In re Christie, Christie* v. *Christie* - - M. R. 17

LOCAL GOVERNMENT—RATES—Dublin Police District—Police Rate—Apportionment *between county borough and outside area—Local Government* (*Ireland*) *Act*, 1898 (61 & 62 *Vict. c.* 37, *sect.* 65, *sub-s.* 2, *sect.* 66.] Under the Dublin Police Acts, as amended by the Local Government (Ireland) Act, 1898, sect. 66, sub-ss. 2 and 4, the Commissioner of Police is entitled to raise for the maintenance of the police force an amount not exceeding eight pence in the pound on the annual value of the rateable hereditaments in the police district, which is apportionable between the city of Dublin and the rest of the district according to rateable value. Pursuant to sect. 65, sub-s. 1, of the Local Government (Ireland) Act, 1898, a revaluation of the county borough of Dublin was made by which the total valuation of the rateable hereditaments in the borough was largely increased. This revaluation came into force on April 1st, 1916. *Held*, by the Court of Appeal (Sir Ignatius O'Brien L.C. and Molony L.J., Ronan L.J. dissenting), affirming the decision of the Master of the Rolls, that sect. 65, sub-s. 2, of the Local Government (Ireland) Act, 1898, applied to the police district as if it was a union; that following the decision of the Court of Appeal in *Belfast Guardians* v. *Belfast Corporation* (No. 1), [1910] 2 I. R. 534, the word "at" in sect. 65, sub-s. 2, was to be construed as meaning "before," not "after"; and that, therefore,

LOCAL GOVERNMENT—*continued.*
the estimate and apportionment made in March, 1917, should have been made on the old valuation. *Attorney-General* v. *Dublin Corporation*
[M.R., App. 401

LOCAL REGISTRATION OF TITLE.
See Land Registry.

LUNATIC—**Sale of undivided Share of land**—*Jurisdiction of Lord Chancellor—Lunacy Regulation (Ireland) Act*, 1871, *sects.* 63, 67, 74—*Settled Land Act*, 1882, *sect.* 2, *sub-ss.* 5, 6; *sect.* 58, *sub-s.* 1; *sect.* 62.] A lunatic so found by inquisition was owner of an undivided share of lands as tenant in tail, and also of an undivided share of other lands as tenant in fee-simple. *Held*, by the Lord Chancellor, that he had jurisdiction under section 63 of the Lunacy Regulation (Ireland) Act, 1871 (34 & 35 Vict. c. 22), to direct a sale of the lunatic's share in the fee-simple lands to certain of the co-owners, and under sections 58 and 62 of the Settled Land Act, 1882, to authorize the committee of the lunatic's estate on her behalf to exercise the lunatic's powers as a tenant for life under the Settled Land Acts, and to convey the share of the lunatic therein to the same persons in consideration of sums paid into Court to the credit of the matter. *In the Matter of D, a person of Unsound Mind*
[Lord Chancellor in Lunacy 344

MAINTENANCE AND ADVANCEMENT of Infant—Reversionary Interest.
See Infant. [M.R. 181

MORTGAGE SUIT—Costs of puisne incumbrancer—priority - - - - 341
See Costs.

NEXT-OF-KIN — Statute of Limitations—Shares acquired by - - - - 17
See Limitations, Statute of—Realty.

NUISANCE—**Sewer**—*Sewage*—*Stream*—*Unreasonable and negligent exercise of Statutory Power.*] The plaintiff was owner and occupier of pasture and meadow lands, which adjoined S. Street, in the outskirts of the town of *D*. A stream passed under *S*. Street into plaintiff's lands, and was the watering-place for his cattle. Defendant was the owner of some old houses in *S*. Street. They had no w.c. accommodation; but the surface-water from their yards was carried into a surface-water roadside drain which flowed into the stream before it entered plaintiff's lands. This drain was held to be a "sewer" within the meaning of the Public Health Acts, but it was admitted that it was unfit for carrying fæcal sewage, and that it would be insanitary and improper to use it for that purpose. The defendant built on the site of the old houses four new

NUISANCE—*continued.*
houses with w.c. accommodation. The defendant was a member of the local sanitary committee which was appointed to advise the sanitary authority upon sanitary questions. In that capacity he joined in advising the sanitary authority that there was no "main sewer in *S*. Street," and that it was absolutely necessary to construct a new sewer for the drainage of defendant's house. The sanitary authority invited tenders for a new sewer, but did not proceed with the work. The defendant did not resort to his statutory remedy of complaint to the Local Government Board, but proceeded to connect his new w.c.'s with the surface-water sewer, and to let his houses to tenants. The necessary and obvious result of his doing so was that the fæcal sewage, within four minutes of leaving his premises, passed through the surface-water sewer into the plaintiff's stream and pasture lands, and caused a serious and injurious nuisance. The defendant claimed an absolute right to cause his house-drains to empty into any sewer of the sanitary authority regardless of the consequences to third parties. *Held*, that the defendant had exercised his statutory right of causing his drains to empty into the sewer of the sanitary authority in an unreasonable and negligent manner, and without having reasonable regard to the rights of third parties; and that he should be restrained by injunction from discharging fæcal sewage into the surface-water sewer so as to cause it to flow or pass into plaintiff's land, and so as to pollute plaintiff's stream. *Wallace* v. *M'Cartan*.
[Barton J. 377

NURSERY—Ordinary agricultural farm—Fair rent - - - - - - 145
See Land Law Acts—Character of Holding. 2.

ORDER 8, r. 10—**Land Purchase Acts Rules**, 2nd July, 1910—Time for agreement fixing price of superior interest. 466
See Land Purchase Acts—Superior Interest. 2.

PARTIES — Trustees representing debenture-holders - - - - - 194
See Company—Debentures.

PARTNERSHIP—PROPERTY in profits of Land - - - - - - 17
See Limitations, Statute of—Realty.

PERPETUATION OF TESTIMONY—Principles of Law relating to - - 51
See Practice—Evidence. 1.

——— Practice—Jurisdiction declaratory order - - - - - - 57
See Practice—Evidence. 2.

POOR RATE—ADJUSTMENT OF RENT—*Rentcharge — Perpetual Annuity—Local Government (Ireland) Acts*, 1898 *to* 1901 (61 & 62 *Vict. c.* 37; 1 *Edw.* 7, *c.* 28)—*Poor Relief (Ireland) Act*, 1838 (1 & 2 *Vict. c.* 56.)] By deed, dated 4th January, 1822, *M.* (in consideration of the payment of £1200, and other considerations therein mentioned) granted to *A.* and *B.*, their heirs and assigns, a rentcharge of £400 (Irish), charged on lands situate in the urban district of *B.*, which were not agricultural lands, to hold same from and after his decease on certain trusts. All the estate and interest of *A.* and *B.* in the rentcharge became vested in the plaintiffs. All the estate and interest of *A.* and *B.* in the rentcharge became vested in the plaintiffs. All the estate and interest of *M.* in the lands charged with the rentcharge were vested in the defendants as trustees, and they were in receipt of the rents and profits paid by the tenants, which rents had been adjusted by virtue of the provisions of the Local Government (Ireland) Acts, 1898 to 1901, and they claimed in making payment to the plaintiffs of the rentcharge to deduct in every year half the standard amount of poor rate, as defined by the Local Government (Ireland) Act, 1898. *Held*, that the defendants were entitled to make the statutory deduction. *Hewson* v. *Greene* - - - - - BARTON J. 123

POWER OF SALE of Administrator for distribution among next-of-kin - 472
See VENDOR AND PURCHASER—TITLE. 3.

——— Undivided share of lunatic's land 344
See LUNATIC.

1. PRACTICE—EVIDENCE—Perpetuation of Testimony—*Law and Procedure (Emergency Provisions) (Ireland) Act*, 1916 (6 & 7 *Geo.* 5, *c.* 46), *sect.* 1, *sub-s.* 4.] Where an application was made under the Law and Procedure (Emergency Provisions) (Ireland) Act, 1916, sect. 1, sub-sect. 4, to perpetuate the testimony afforded by a deed which had been destroyed in the rebellion: *Held*, that the Act does not affect the general principles governing suits to perpetuate testimony, except by making such a suit maintainable in a case involving present rights; that the granting of an order perpetuating testimony is in the discretion of the Court, and that such an order will not be made in a case in which, in the opinion of the Court, it is not necessary. The principles of law relating to suits to perpetuate testimony stated. *Kelly* v. *Kelly* - - - - - - - M. R. 51

2. PRACTICE—EVIDENCE—Perpetuation of Testimony—*Lost Deed—Destruction during Civil Commotion—Law and Procedure (Emergency Provisions) (Ireland) Act*, 1916 (6 & 7 *Geo.* 5, *c.* 46), *sect.* 1, *sub-s.* 4—*General Jurisdiction of Court.*

PRACTICE—*continued.*

During the rebellion in Ireland in April, 1916, the offices of certain solicitors in the city of Dublin were destroyed, and certain title-deeds and documents, of which the solicitors were custodians, perished. *Held*, that the Court had jurisdiction on an originating summons to order that the evidence of witnesses be taken, and be preserved by being filed in the Record and Writ Office. *Held*, also, that the evidence should, inter alia, be directed to the following points:—1, The existence of the deed before the rebellion which caused its destruction; 2, the fact of its destruction; 3, its due execution: and 4, its contents. *Held*, also, that the Court had under its general jurisdiction power to make a declaratory order, in a proper case, that a copy of a lost deed was a true copy. *Shanahan* v. *Shanahan* - - - - - BARTON J. 57

PRACTICE—LAND REGISTRY—Application for discharge of equities by interested person not owner - - - 170
See LAND REGISTRY. 1.

PRACTICE — PARTIES — *Application by Puisne Incumbrancer to have Proceedings continued—Plaintiffs paid the Amount of their demand—Death of Defendant—Application made ex parte—Order XVII, Rules* 2, 4; *Order XXXIII, Rules* 7, 8.] In a mortgage suit an order for the sale of certain lands of the mortgagor was made, and out of the proceeds the plaintiffs were paid in full. The defendant having died, a puisne incumbrancer, who had not been paid in full, applied ex parte to have the proceedings continued by the original plaintiffs against the personal representative of the defendant. *Held*, that the proper application was for an order to continue proceedings in the name of the applicant as plaintiff, against the personal representative of the defendant, and that the application should be by summons. *Munster and Leinster Bank* v. *Mackey* [M.R. 49

PUBLIC HEALTH ACTS — Unreasonable exercise of statutory power to connect drain with sewer - - - 377
See NUISANCE.

QUIT RENT—Redemption of, under Land Purchase Acts - - - - - 270
See LAND PURCHASE ACTS—SUPERIOR INTEREST. 2.

"REALIZE" - - - - - 454-457
See WILL—WORDS. 3.

RECEIVERSHIP DEED—Registration of as burden—Receivership Deed - 168
See LAND REGISTRY. 2.

RECTIFICATION of Local Register of Title 47
See LAND REGISTRY. 3.

REDEMPTION OF RENT—Character of holding—Crucial date - - 129
See LAND LAW ACTS—CHARACTER OF HOLDING. 1.

REDEMPTION of superior interest—Agreement fixing price—Time for - - 466
See LAND PURCHASE ACTS—SUPERIOR INTEREST. 2.

RENEWABLE LEASEHOLD CONVERSION ACT—Renewal Fines—*Lease for Lives Renewable for Ever—Landed Estates Court Conveyance—Indemnity against "Rent"—Liability of Indemnified Lands to Contribute—Renewal Fines—Fee Farm Rent.*] The lands of *D.* and *K.*, held under a lease for lives renewable for ever, dated the 10th October, 1694, subject to the yearly rent of £15, late Irish currency, with a covenant by the lessor for perpetual renewal on payment by the lessee of one half year's rent as a renewal fine on the fall of each life, were sold by the order of the Incumbered Estates Court, Ireland, in two lots, in the year 1858. By Incumbered Estates Court conveyance, dated the 17th July, 1858, reciting the lease, and the last renewal thereof, dated the 1st April, 1844, the lands of *D.* were conveyed, subject to the rent reserved by the lease, and bound to indemnify all other lands charged with the said rent from the same. The other lands, viz., the lands of *K.*, were conveyed by a similar conveyance, made by the Landed Estates Court, dated the 16th July, 1859, subject to the rent reserved by the lease, but indemnified against the payment of the said rent, and the costs and expenses occasioned by nonpayment thereof, by the lands of *D.*, which had been sold subject and liable thereto, in full exoneration of all other lands charged therewith. There was no renewal of the lease since 1844, though all the lives had dropped. The owner of the reversion expectant on the lease having called upon the owners of the lease to take out a fee-farm grant pursuant to the Renewable Leasehold Conversion Act, the plaintiff, as owner of the lands of *D.*, claimed a contribution from the defendant, as owner of the lands of *K.*, proportionate to their value towards payment of the septennial fines and the addition to the fee-farm rent representing the annual value of the renewal fines. The defendant contended that he was indemnified against all liability by the terms of the conveyance of the 16th July, 1859, made to his predecessor in title. *Held*, that the lands of *D.* were bound to indemnify the lands of *K.* from payment of a proportionate part of the half year's rent, payable as a renewal fine on the fall of each life in the lease and the renewals thereof, and against payment of a proportionate part of the increase of the yearly rent reserved by the lease occasioned by the conversion into a fee-farm grant pursuant to the Renewable Leasehold Conversion Act. *Fitzpatrick* v. *Warren*. - M.R. 156

RENEWABLE LEASEHOLD CONVERSION ACT—*continued.*

RENEWAL OF LEASE—Limited right of renewal—Validity - - 484
See VENDOR AND PURCHASER—TITLE. 1.

RENT-CHARGE — Deduction of poor rate from - - - - - - 123
See POOR RATE—ADJUSTMENT OF RENT.

REOPENING BIDDINGS—Auctioneer appointed by Court—Mistake - 321
See SALE OF LANDS BY THE COURT.

REPUBLICATION of Will by Codicil 286-289
See WILL—REPUBLICATION BY CODICIL.

RESIDUARY PERSONALTY — Primary liability of, for payment of debts 278
See WILL—CHARGES.

RES JUDICATA - - - - 203, 208
See COMPANY—DEBENTURES.

REVERSIONARY INTEREST—Maintenance and advancement of infant—Charge on corpus - - - - - - 181
See INFANT.

REVOCATION—Implied, of will by codicil 337
See WILL—REVOCATION.

RULES AND ORDERS — Or. XVI, r. 8—Trustees representing debenture-holders
See COMPANY—DEBENTURES. [203, 208

—— Or. XVII, rr. 2, 4 - - - - 49
See PRACTICE—PARTIES.

—— Or. XXXIII, rr. 7, 8—Continuing proceedings - - - - - - 49
See PRACTICE—PARTIES.

—— Local Registration of Title Rules — Or. VI, r. 1 - - - - - - 47
See LAND REGISTRY. 3.

—— Local Registration of Title Rules, 1910 — Or. IV, r. 20 - - - - - 168
See LAND REGISTRY. 2.

SALE OF LANDS BY THE COURT—Reopening Biddings—*Auctioneer appointed by Court — Mistake — Innocent misrepresentation by Auctioneer as to value of property sold—Confirmation of Sale—Re-sale—Sale of Land by Auction Act*, 1867 (30 & 31 *Vict. c.* 48).] At a sale of lands under the order of the Court by an auctioneer appointed by the Court, the latter, owing to an innocent mistake on his own part, stated the amount of certain conacre lettings which had been made of portion of the lands sold, and which was to belong to the purchaser, to be £146 6*s.* 9*d.*,

SALE OF LANDS BY THE COURT—*cont.*

whereas the true figures were £332 12*s.* 1*d.* The mistake was not discovered until after the sale, at which *M.*, the present appellant, was declared the highest bidder for £4300, and he paid his deposit on the purchase-money. This bid exceeded the reserve price fixed by the Court. *D.*, who had bid £4260 at the sale, then increased his offer to £5000. The Chief Clerk refused to issue his certificate confirming the sale until the matter had been brought before the Court, and on an application for directions the Master of the Rolls directed the lands to be again put up for sale, *D.* undertaking at such resale to make an initial bid of £5000. *Held*, by the Court of Appeal, affirming the order of the Master of the Rolls, that the error was one by an officer of the Court acting as such; that there had been improper conduct in the management of the sale within sect. 7 of the Sale of Lands by Auction Act, 1867; and that, apart from the latter section, the Court had power under its general jurisdiction to refuse to confirm the sale in the circumstances which had arisen. *In re Longvale Brick and Lime Works, Limited; Colquhoun and the Longvale Brick and Lime Works, Limited* - - - - - App. 321

SALE OF LANDS—Entry in Auctioneer's book *See* Frauds, Statute of. [348

SATISFACTION—Appointment by deed—Subsequent appointment by deed "in full discharge" - - Wylie J. 240 *See* Will—Satisfaction.

1. SETTLEMENT — CONSTRUCTION — Equitable Interests in Realty—*No Words of Limitation—Trust to convey—Period of Distribution.*] By a marriage settlement real property was conveyed to a trustee upon trust, after the solemnization of the marriage, to permit the wife to receive the rents for her life, then to permit the husband to receive the rents for his life, should he survive, then upon trust to convey the property to the children of the marriage, subject to appointment, and in default of appointment to the children of the marriage, if more than one, share and share alike, and if only one, then to such only child, and upon further trust, after the death of the survivor of the husband and wife, in case there should not be any issue of the marriage, to convey the property to *S.* and *G.*, sisters of the wife, their and each of their heirs, executors, administrators, and assigns, and if either of them should die leaving issue then upon trust to convey the share of her so dying to her issue, if more than one, share and share alike, and upon trust after the decease of the survivor of the wife, husband, *S.*, and *G.*, without issue of any of them, to convey the property unto the children of the late *H. B.*, if more

SETTLEMENT—*continued*

than one, share and share alike, and if only one such child, the whole to such only child. There was no issue of the marriage. *S.* and *G.* died unmarried. Both they and the husband died in the lifetime of the wife. She subsequently died. There were ten children of *H. B.* living at the date of the settlement, eight of whom survived the wife. *Held*, that, under the trusts of the deed, the trustee was only bound to convey once, viz., on the death of the survivor of the two tenants for life, and, accordingly, that the children of *H. B.* who were alive at the time of the death of the wife were entitled to call for a conveyance. *O'Mahony* v. *Burdett* (L. R. 7 H. L. 388) considered. *Colles's Estate*

Wylie J. 260 [Affirmed by C.A.].

2. SETTLEMENT—CONSTRUCTION—Resulting Trust—*Charge on Real Estate settled—Income for the person for time being entitled to the Real Estate, during certain lives—Corpus, on death of surviving life, for the person then entitled to the Inheritance, and to merge—Trust in event of Sale of Real Estate for Payment of Incumbrances — Voluntary Sale while one of the lives in being—Resulting Trust. O'Connor* v. *Tanner* - - - H. L. 56

SEWER — Unreasonable exercise of statutory power to connect with - - 377 *See* Nuisance.

STATUTES—10 Car. 1, sess. 2, c. 3, Ir. Fraudulent Conveyances. - 348 *See* Frauds, Statute of.

—— 1 & 2 Vict. c. 56—Poor Relief—Deduction of poor rate from rent-charge . 123 *See* Poor Rate—Adjustment of Rent.

—— 30 & 31 Vict. c. 48—Sale of Land by Auction Act, 1867 - - - - - 321 *See* Sale of Lands by the Court.

—— 33 & 34 Vict. c. 46—Landlord and Tenant (Ir.) Act, 1870, s. 45. - - 361 *See* Land Registry. 4.

—— 34 & 35 Vict. c. 22—Lunacy Regulation (Ir.) Act, 1871. - - - - - 344 *See* Lunatic.

—— 35 & 36 Vict. c. 32—Landlord and Tenant (Ir.) Act Amendment Act, 1872, s. 2 361 *See* Land Registry. 4.

—— 44 & 45 Vict. c. 49—Land Law (Ir.) Act, 1881, s. 30—Sub-division of holding 361 *See* Land Registry. 4.

—— 45 & 46 Vict. c. 38—Settled Land Act 344 *See* Lunatic.

—— 50 & 51 Vict. c. 33, s. 9—"Ordinary Agricultural farm" - - - - - 145 *See* Land Law Acts—Character of Holding. 2.

STATUTES—*continued.*

—— 50 & 51 Vict. c. 33—Land Law (Ir.) Act, 1887, s. 15, ss. 3 - - - 270
See LAND PURCHASE ACTS—SUPERIOR INTEREST. 3.

—— —— c. 33, s. 16—Land Law (Ir.) Act, 1887—Apportionment - - - 11
See LAND PURCHASE ACTS—SUPERIOR INTEREST. 1.

—— 53 & 54 Vict. c. 39, s. 20—Partnership 17
See LIMITATIONS, STATUTE OF—REALTY.

—— 54 & 55 Vict. c. 66—Local Registration of Title—Rectification of Map Practice 47
See LAND REGISTRY. 3.

—— —— c. 66—Local Registration of Title, ss. 35-38—Sub-division - - - 361
See LAND REGISTRY. 4.

—— —— c. 67—Redemption of Rent Act, 1891 [129
See LAND LAW ACTS—CHARACTER OF HOLDING. 1.

—— 56 & 57 Vict. c. 39, s. 49—Industrial and Provident Societies Act, 1893. - 93
See INDUSTRIAL AND PROVIDENT SOCIETY.

—— 59 & 60 Vict. c. 47—Land Law, s. 7—Bona fide occupation - - - 145
See LAND LAW ACTS—CHARACTER OF HOLDING. 2.

—— —— c. 47—Land Law (Ir.) Act, 1896, s. 31, ss. 1, 3, 8 - - - 270
See LAND PURCHASE ACTS—SUPERIOR INTEREST. 3.

—— 61 & 62 Vict. c. 37—Local Government (Ir.) Act, 1898—Deduction of poor rate from rent-charge - - - - 123
See POOR RATE—ADJUSTMENT OF RENT.

—— —— c. 37, sub-s. 65, s. 66 M.R. APP. 401
See LOCAL GOVERNMENT—RATES.

—— 1 Edw. 7, c. 28—Deduction of poor rate from rent-charge - - - 123
See POOR RATE—ADJUSTMENT OF RENT.

—— 3 Edw. 7, c. 37—Irish Land Act, 1903, s. 54—Sub-division of holding - 361
See LAND REGISTRY. 4.

—— —— c. 37—Irish Land Act, 1903, s. 64 270
See LAND PURCHASE ACTS—SUPERIOR INTEREST. 3.

—— —— c. 37, Irish Land Act, 1903, ss. 88, 89—Duties of Assessor on Appeals - 145
See LAND LAW ACTS—CHARACTER OF HOLDING. 2.

—— 8 Edw. 7, c. 69, s. 129—Companies Consolidation Act, 1908—Just and equitable 67
See COMPANY—WINDING UP.

STATUTES—*continued.*

—— 6 & 7 Geo. 5, c. 46, s. 1—Law and Procedure (Emergency Provisions) (Ireland) Act, 1916 - - - - - - 57
See PRACTICE—EVIDENCE. 2.

—— —— c. 46—Emergency Provisions (Ir.) Act, 1916—Perpetuation of testimony 51
See PRACTICE—EVIDENCE. 1.

STATUTORY POWER — Unreasonable and negligent exercise of - - 377
See NUISANCE.

STAYING PROCEEDINGS — Disputes between Industrial Society and members 93
See INDUSTRIAL AND PROVIDENT SOCIETY.

SUBDIVISION of holding without consent of Land Commission - - - 361
See LAND REGISTRY. 4.

TOWN PARK—Report of assessor—Evidence [145
See LAND LAW ACTS—CHARACTER OF HOLDING. 2.

TRUST—Bequest to executors for the testator's "best spiritual advantage" - 448
See WILL—UNCERTAINTY.

UNCERTAINTY — Gift to charity subject to prior gift which failed - - 183
See CHARITY, GIFT TO. 3.

1. **VENDOR AND PURCHASER—TITLE—Lease—Renewal**—*Lapse of time—Validity.*] A lease contained a covenant for renewal every thirty years during a period of 999 years, no time being fixed within which the lease was to be renewed. In 1913, nineteen years after the expiration of the previous lease, a tenant for life of the premises granted a renewal to the lessee, who had remained in possession, paid the rent, and observed the conditions of the lease. On the sale of the lessee's interest the purchaser challenged the validity of the renewal on the ground that it was out of time. *Held*, that the mere lapse of time did not render the renewal inoperative, and that, except in a case where time was of the essence of the contract, no distinction could be drawn between the powers of an absolute owner and those of a limited owner to grant a renewal. *Allen* v. *Murphy*. APP. 484

2. **VENDOR AND PURCHASER—TITLE—Mortgagee in Possession — Emergency Legislation**—*Power of Sale—Courts (Emergency Powers) Act*, 1914 (4 & 5 *Geo.* 5, *c.* 78), *sect.* 1, *sub-s.* 1 (*b*).] The expression "mortgagee in possession" in sect. 1, sub-s. 1 (*b*), of the Courts (Emergency Powers) Act, 1914, means a mortgagee who has taken possession without leave of the Court. *In re Provident Association of London, Ltd., and Gollogaly's Contract* - - M. R. 240

3. VENDOR AND PURCHASER—TITLE—Sale of leasehold by administrator—*Power of Sale for purpose of distribution among next-of-kin.*] An administrator, who has paid the funeral and testamentary expenses and debts of an intestate, has a power of sale over the leasehold property of the intestate for the purpose of distribution among the next-of-kin. *In re Norwood and Blake's Contract* - - - - - - M.R. 472

WILL—ABSOLUTE GIFT—Corpus given by Gift of Income—*Gift of Income derived from Estates—Disposition of Residue of "my income, estates," &c.—Contrary Intention.*] A testatrix gave to her husband "one half of the income derived from my share in estates in Ireland," and made a disposition of "the residue of my income, estates," etc., in favour of her daughter. *Held*, that there was nothing in the will to indicate an intention to cut down the devise to the husband of the absolute interest in the corpus contained in the gift of the income of the estates. *Baker* v. *Blount* - - - - - - APP. 316

WILL—Bequest for establishing a monastery or any other religious, ecclesiastical, or charitable institution—Invalidity M.R. 388
See CHARITY, GIFT TO. 1.

WILL—CHARGES—Charge of Debts and Legacies on specific fund of personalty—*Primary liability of residuary personalty for payment of debts.*] A testator directed his executor to sell his farm, and out of the proceeds to pay certain legacies, and his debts, funeral and testamentary expenses. The balance of the proceeds of the sale he directed to be divided equally between two charities. There was no disposition of any other property. *Held*, by the Court of Appeal (1), affirming Barton J., that there were no sufficient grounds for exempting the undisposed of personalty from its primary liability for debts, and that the debts, funeral and testamentary expenses were primarily payable thereout. *Newbegin* v. *Bell* (23 Beav. 386) followed. *M'Morren, d. Walker* v. *M'Kay* - - BARTON J., APP. 278, 280

WILL — CONDITION — Accrued Shares *subject to conditions affecting Original Shares—Portions for Daughters—Gift over on death unmarried.*] A testator by his will charged his estates with the sum of £27,000, and bequeathed the same to trustees upon trust to pay to each of his nine daughters the sum of £3000, not to be raised or become payable till her marriage, when same was to be paid and advanced as her fortune, but in lieu thereof each of his daughters was to receive an annuity of £100 until marriage; if any daughter died unmarried before her portion became payable, she was to have power to dispose by will

WILL—*continued.*

of £1000 of it amongst her sisters, the residue of the portion or portions of any daughter dying unmarried to go to, and to be applied towards, increasing the portions or shares of the surviving daughters, provided that the portion or share of any daughter was in no event to exceed the sum of £5000. The testator's nine daughters survived him. Three married, and received their portions. The testator's daughter *E.* died unmarried, having appointed the sum of £1000, part of the £3000, amongst such of her sisters as should survive her and not have been married, in equal shares. She left surviving six sisters, one married and five unmarried. On her death each of the fortunes of her surviving sisters became increased by the sum of £333 6*s.* 8*d.*, being one-sixth of £2000, the residue of her fortune, and her married sister became entitled to and was paid a like sum of £333 6*s.* 8*d.* Subsequently the testator's daughter *F.* died unmarried, having appointed the sum of £1000, part of her £3000, to her surviving sisters in like manner. On the death of *F.* the fortunes of each of her four unmarried sisters, which had been increased by £333 6*s.* 8*d.*, became further increased by a sum of £400, being one-fifth of £2000, the residue of her fortune, and her married sister became entitled to be paid a like sum of £400. *Held*, on the true construction of the testator's will, that the additional portions should go in the same manner as the original portions, and that the shares accrued as well as original were only raisable in the event of marriage. *Hayes* v. *Hayes*
[M. R. 194

WILL—LIMITATIONS—Gift of Personal Estate to A "or his heirs"—*Substitution.*] A testator bequeathed to his wife the income of all his property during her lifetime, and directed everything to be sold at her death, and the proceeds to be equally divided, one-half among his wife's and one-half among his own relations, viz., "to *S.* or her heirs, to *L.* or her heirs, to *H.* or her heirs, to *F.* or her heirs, in four equal shares . . .; to *J.* or his heirs, to *C.* or her heirs, and to *J.* or his heirs, in three equal shares." All these named relations survived the testator, but three of them died during the lifetime of the testator's wife, viz. *S.*, who died intestate, leaving a husband and seven children, *J.*, who left a widow and next-of-kin but no children, and *C.*, who died a spinster and intestate. *Held*, 1, that in all these gifts the word "heirs" meant such persons as would be entitled to succeed to personal property ab intestato; and 2, that upon *S.*'s death, her husband, being the person who on her death was entitled to her personal property ab intestato took her share. *In re Cusin, d. Walker* v. *Cusin*
[BARTON J. 63

WILL—REPUBLICATION BY CODICIL—Date of Will brought down to date of Codicil—*Substitutional Gift—Extrinsic Evidence.*] A testator, by his will, gave to his son a power to appoint a jointure, not exceeding £200 per annum, charged on the lands of *C.*, to any woman the son might marry. The son, subsequently to the date of the will, having married *E.*, the testator, by a codicil, revoked certain devises contained in the will, and directed that *E.* should receive out of the lands of *C.* a jointure rentcharge of £200 per annum during her life. *Held*, by Barton J., that parol evidence was admissible to show the testator's intention, and that, so far as *E.* was concerned, the jointure in the codicil was in substitution for, and not in addition to, the power of jointuring given by the will. *Held*, by the Court of Appeal, that the judgment of Barton J. should be affirmed. *Held*, by Sir I. J. O'Brien C., that, on the true construction of the will and codicil, the jointure given by the codicil was in substitution for that given by the will; but that extrinsic evidence as to the value of the testator's estate was not admissible, the question being one purely of construction. *Held*, by Ronan and Molony L.JJ., that the codicil operated as a republication of the will; that accordingly, in the absence of contrary intention, the language of the will must be construed as of the date of the codicil, and that there was no evidence of any such contrary intention. The principle and effect of republication of a will by a codicil of later date considered. Dicta in *Mountcashell* v. *Smyth*, [1895] 1 I. R. 346, discussed. *Grealey* v. *Sampson.* BARTON J., APP. 286, 289

WILL—REVOCATION—Codicil—Where a devise in a will is clear and unambiguous, the onus is on those alleging revocation by a codicil to show that the expression of the testator's intention to revoke is equally clear and unambiguous. *Hearle* v. *Hicks*, 1 Cl. & Fin. 20, and *In re Stoodley*, [1915] 2 Ch. 295, applied. *Pennefather* v. *Lloyd* [BARTON J. 337

WILL—SATISFACTION—Power of Appointment by Deed or Will—*Appointment by Will among certain objects equally—Subsequent Appointment by Deed to one of the same objects "in full discharge" of share of Appointee—Satisfaction pro tanto.*] By his will, dated in 1893, a testator, in exercise of a power by deed or will to appoint a portions charge of £10,000 among his younger children, appointed that the said sum should be paid in equal shares to all his daughters, of whom there were four. By deed, executed in 1896, on the marriage of one of his daughters, reciting the said power, and that there were six children of his marriage, he irrevocably appointed that £2,000, portion of the £10,000, should immediately belong to his said daughter, and he directed

WILL—*continued.*

that the said sum of £2,000 should be "in full discharge" of the share of his said daughter in the £10,000. He died in 1897, leaving his four daughters him surviving. *Held*, that the sum appointed by the deed of 1896 was in satisfaction pro tanto only, and accordingly that the married daughter became entitled under the will to £500 in addition to the £2,000 so appointed to her by deed. *Kingsmill Moore's Rents* [WYLIE J. 244

WILL—UNCERTAINTY—Trust—*Charity—Bequest to executors for the testator's "best spiritual advantage."*] Gift, in the will of a Roman Catholic clergyman, of residue to the testator's executors, who were also Roman Catholic clergymen, to dispose of it "to my best spiritual advantage, as conscience and sense of duty may direct." *Held*, not charitable, but a lawful trust which the executors might execute. *In re Gibbons; Dalton* v. *Gibbons* - - BARTON J. 448

1. WILL—VESTING—Gift to husband of unmarried daughter.] A devise or bequest "to the husband of *A.*," if there be no such person, either at the date of the will, or at the death of the testator, applies to the person who shall first answer the description of husband at any subsequent period. A testator bequeathed securities to trustees upon trust to pay the income to his grand-daughter for her sole and separate use, free from the debts, control, or engagements of any husband she might marry; and from and after her death upon trust to pay the annual income to her husband surviving her for his life; and as to the capital thereof upon trust, after the death of the survivor, for her children or remoter issue; and in default of such issue becoming entitled, then upon trust as to £10,000 for such person or persons as she should by will or deed appoint, and, subject thereto, upon trust to pay the unappointed portion of the £10,000 and the residue to the children of the testator's nephews. The testator's grand-daughter, subsequent to testator's death, married a husband, who predeceased her. There was no issue of the marriage. Having appointed the £10,000 to herself absolutely, and having attained the age of fifty-nine years, she applied that the £10,000 should be raised and paid to her. *Held*, that she was entitled to the order sought. *Blount* v. *Crozier* BARTON J. 461

2. WILL—VESTING—Period of distribution—*Gift of income of fund to widow till re-marriage—Gift over on her death—"Then living."*] A testator directed his executors to pay to his wife the income of a fund of £1000 until her re-marriage (which event happened), and then to pay her £300 out of the fund. He directed that on the widow's

WILL—*continued.*

death the £700 residue should be divided among the oldest sons of his brother and sisters "then living and mentioned in this will." *W.* was the first-born son of a sister of the testator. He died before the re-marriage of the widow. The mother of *W.* was mentioned by name in the will, and survived the widow. *Held*, that *W.* took a vested interest in the sum of £700 liable to be divested if his mother had pre-deceased the widow, and, as this event had not happened, that he became entitled to a share of the fund of £700. *In re Crothers' Trusts* (*No.* 2) - BARTON J. 356

1. **WILL—WORDS—"My Real Estate consisting of my Interest in the Lands of D"**—*Separate Disposition of Personalty—Beneficial Interest in charges affecting the Lands.*] A testator possessed of real estate and entitled to the beneficial interest in certain charges upon a portion of his lands, made a devise of his real estate consisting of his interest in the lands of *D.* and *K.*, and also disposed separately of his personal estate. *Held*, that the beneficial interest in the charges did not pass under the terms of the devise. Technical expressions used in a will must be given the meaning assigned to them by law, unless the context contains a plain indication of a contrary intention. *Mackesy* v. *Mackesy*, [1896] 1 I. R. 511; *Kilkelly* v. *Powell*, [1897] 1 I. R. 457, distinguished. *Davy* v. *Redington* - APP. 250

2. **WILL—WORDS—"My Shares"**—*Interest as Next-of-kin in Shares of a Deceased Intestate.*] A testatrix made a bequest of "my shares in different securities." *Held*, that the testatrix's interest, as one of the next-of-kin of a deceased intestate, in certain shares and stock, which formed part of the unadministered estate of the intestate, did not pass under the bequest. *Vanneck* v. *Benham*, [1917] 1 Ch. 60, applied. *In re Holmes, Villiers* v. *Holmes* - - - - - BARTON J. 165

3. **WILL — WORDS — "Realize."**] A will, under which the defendant took and accepted considerable benefits, contained the following provision: If the mortgage should be realized which *E. L. O'H.* (the defendant) has on the lands of *S.*, she is to pay to her sister (the plaintiff) £200." The defendant instituted proceedings in the High Court of Justice, Chancery Division, to raise the amount of the mortgage, and the lands comprised in the mortgage were sold. The proceeds were insufficient to pay off the mortgage debt (£1900) in full, and a sum of £182 still remained due. *Held*, by the Court of Appeal (reversing Barton J.), that the mortgage had not been "realized." *Masterson* v. *O'Halloran*

[BARTON J.; APP. 454, 457

WILL—WORDS—"My income, estates," &c.—"heirs" in relation to personal property
See WILL—LIMITATIONS. [63

——— "Presbyterian missions and orphans"—Charity - - - - - 332
See CHARITY, GIFT TO. 2.

——— "Then living." - - . 356
See WILL—VESTING. 2.

WORDS—"At" the date when the re-valuation under sect. 61, sub-s. 2, of 61 & 62 Vict. c. 37 came into force construed as "before" - - M.R. APP. 401
See LOCAL GOVERNMENT—RATES.

——— "Improper conduct" in management of sale, 30 & 31 Vict. c. 48 - 321
See SALE OF LANDS BY THE COURT.

——— "Ordinary agricultural farm"—Nursery [145
See LAND LAW ACTS—CHARACTER OF HOLDING. 2.

THE END.

BIBL.
LOVAN.
UNIV.